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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 18

UTAH PIE COMPANY,

Petitioner,

vs.

CONTINENTAL BAKING COMPANY, CARNATION COMPANY AND PET MILK COMPANY,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF FOR RESPONDENT CARNATION COMPANY

QUESTIONS PRESENTED

Utah Pie Company ("Utah Pie") suggests at least ten questions are presented by its petition (Br. of Petitioner, pp. 2-6). Since most of these do not apply to Carnation Company ("Carnation"), it is submitted there are only two basic questions insofar as Carnation is concerned:

A. The three questions assigned by the Court may be summarized in the single question: whether the mandate of the Court of Appeals of the Tenth Circuit directing that judgment be entered for Carnation was a proper exercise of its power, in view of the fact that Carnation filed and the trial court denied the requisite motions under Rule 50(b), and petitioner has not presented any grounds, either to the Court of

Appeals or to this Court, why it should have a new trial as to Carnation.

B. The issues presented by Utah Pie's petition may be summarized in the single question: whether the Court of Appeals for the Tenth Circuit correctly concluded that petitioner, Utah Pie Company, a local seller in a primary line geographical price discrimination case, failed to meet its burden of proof under section 2(a) of the Robinson-Patman Act that intermittent and sporadic differences in Carnation's prices for its eight-inch, 24-ounce Simple Simon frozen pies in different and unrelated markets may substantially lessen competition or tend to create a monopoly when the facts showed:

1. Utah Pie Company, by price cutting and systematic price discriminations in favor of large buyers, captured and maintained a dominant position in the Salt Lake market.

2. In the face of competition with a large number of other sellers, Utah Pie not only increased its volume of sales every year but also increased its profits, net worth and salaries paid its owner-employees and sold four and one-half times as many pies as did Carnation, which lost volume, market share and profits in the Salt Lake market while pricing its pies well above the general level in that market.

3. There was no evidence of predatory intent or conduct on the part of Carnation.

4. Carnation had no power to control prices or exclude competition in any market, but on the contrary was faced with the countervailing power of strong competition in every market.

5. There was no evidence of any nexus between Carnation's prices in any market and either its prices in the Salt Lake market or the level of prices, volume sold or ability to compete

of any seller in the Salt Lake market and particularly not with the prices, market share or profit picture of Utah Pie Company.

THE PROCEEDINGS BELOW

The Petitioner, Utah Pie, brought this action against the three respondents, Carnation Company, Continental Baking Company and Pet Milk Company ("Carnation," "Continental," and "Pet"), by a single complaint filed in the United States District Court for the District of Utah, in September, 1961. The complaint alleged that Carnation and the other respondents had conspired to restrain and monopolize interstate commerce in frozen fruit pies by destroying the competition of Utah Pie, in violation of sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and 2), and that Carnation and the other respondents had each individually violated section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act (15 U.S.C. § 13(a)), by planned geographic price discrimination in the sale of frozen fruit pies (R. 16-20). Continental counterclaimed, alleging that petitioner had itself violated section 2(a) by discriminations in the sale of its own pies (R. 31-33).

Prior to trial, Carnation moved the court for summary judgment on the conspiracy claim and for a severance and separate trial of the section 2(a) claim against it (R. 371). The motion was denied (R. 39-40) and in February, 1963, the conspiracy claim, the three separate section 2(a) claims and Continental's section 2(a) counterclaim were tried *en masse* (R. 1511) in a three-week jury trial.

The jury returned a verdict for Carnation and the other respondents on petitioner's conspiracy claim (R.43), which verdict was not appealed and is not before this Court. The jury found that each of the parties individually, including

petitioner, had unlawfully discriminated in price (R. 1405-1406).

The court entered judgment on the verdicts against Carnation, Pet and Continental, trebled the damages, and awarded attorneys' fees (R. 1409). Over vigorous objections by Carnation and each of the other respondents (R. 52-54, 56-58, 1415), the court also entered a sweeping injunction prohibiting each respondent from selling frozen fruit pies in the states of Utah, Idaho, Washington, Montana and Colorado at prices lower than its prices in the state of California, without further order of the court (R. 47-48). Although petitioner had not moved for a directed verdict on Continental's counterclaim, the court granted petitioner's motion for judgment n.o.v. (R. 45, 1422).

Each respondent, having made appropriate motions in the trial court (R. 50-52, 54-55, 59, 603, 1228-1229), appealed the judgment against it to the United States Court of Appeals for the Tenth Circuit. In March, 1963, that court stayed the injunctions pending the appeal (R. 1449-1450). More than two years later it issued its opinion (R. 1451-1526)[1] reversing the judgments on the price discrimination verdicts, with directions to enter judgment for each of the respondents, and remanding Continental's counterclaim for a new trial. This Court granted certiorari on November 15, 1965 (R. 1527).

[1] The opinion is officially reported at 349 F.2d 122.

STATEMENT OF FACTS

In the years 1958-1961 (the period covered at the trial) Utah Pie and Carnation competed in the manufacture and sale of frozen fruit pies, eight inches in diameter and twenty-four ounces in weight,[1] in an area known to the trade as the "Salt Lake market," encompassing the state of Utah, Southern Idaho, and fringes adjacent to the state of Utah in Wyoming, Colorado and Nevada[2] (R. 216, 1176; Pl. Ex. 4; R. 67, 1530-1655; Ex. C-Q; R. 1164, 5779-5820; R. 693, 711, 1186). In those years Utah Pie secured and maintained an increasingly profitable position as the largest seller of frozen pies in the Salt Lake market by price cutting and systematic price discriminations (*infra*, pp. 14-22).

Utah Pie's complaint alleged that Carnation and the other respondents had injured Utah Pie by selling frozen pies at low prices in the state of Utah and high prices in "other western states" (R. 16, 19). Petitioner's counsel altered his theory of Carnation's alleged geographical price discrimination at each subsequent stage of the proceedings: by the time of the pre-trial, it was low prices in six western states and high prices in a place defined only as "another area" (R. 34); at the trial, it was low prices in the Salt Lake market and high prices in the Los Angeles market, Carnation's plant site (R. 65, 66-67, 458-459, 1130, 1220, 1221, 1237, 1243, 1448); in the form of verdict, drafted by petitioner's counsel, it was low prices in the Salt

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[1] Limited to eight-inch pies in the flavors apple, cherry, boysenberry, peach, pumpkin and mince (R. 49). In its brief (p. 9) petitioner adds, for the first time, blueberry to the menu. The relevance of this additional flavor is not apparent. Carnation also marketed a deluxe nine-inch pie, as well as eight-inch pies of other fruit flavors, eight-inch cream pies and other products, none of which is directly involved in this case (e.g., Pl. Ex. 65; R. 464, 2368).

[2] The Court of Appeals in finding this to be the relevant market noted that petitioner's sales outside of Utah and Southern Idaho were "negligible" (R. 1458).

Lake market and high prices in a place described only as "elsewhere" (R. 1406); in the decree, also drafted by petitioner's counsel (R. 1412-1413), it was low prices in five western states and high prices in the entire state of California (R. 47-48); and in the Court of Appeals it became, for the first time, low prices in the Salt Lake market and high prices in the San Francisco market (R. 1452). Apparently, petitioner has decided to cling to this last theory in its argument to this Court (Br. 34-40).

1. The Frozen Pie Industry is New and Rapidly Expanding With Vigorous Competition.

The frozen pie industry is an adjunct to the so-called "convenience foods" industry which developed following World War II (R. 1010). It is "a new and a very dynamic industry" which quickly mushroomed from fifteen or twenty manufacturers in 1955 to more than 200 in 1963 (R. 1010-1011).

Carnation and the other respondents were among the 1955 competitors (R. 271, 391, 450). By June, 1959, a growing number of manufacturers were competing nationally, regionally and locally (Pl. Ex. 61; R. 436, 2275, 2294).

Extreme ease of entry made the industry highly competitive (R. 1011, 1105-1106). A local bakery with a freezer locker could become a frozen pie seller almost overnight, and if (as was likely) it enjoyed low overhead, advantageous freight rates and a good name, it could quickly carve out a niche for itself in the custom of the local grocers. Utah Pie's own experience is a case in point.

> Q. What was necessary so far as additional equipment or location or anything else to make that transformation from the baked pie business into the frozen pie business?

A. There was nothing. We needed nothing to move from fresh pie to frozen pies.

Q. You used the same location did you?

A. Yes.

Q. You already had freezing facilities?

A. Yes. [R. 524]

The competition of strong local sellers, the competition among local retailers, and the peculiarities of consumer preference all combined in the early days of the industry to form a number of geographically distinct markets, roughly defined by the areas served by the major metropolitan newspapers (R. 696-697, 711-712, 749-750, 1186-1187, 1189-1193). There was "ordinarily a different competitive situation in each and every market" (R. 1173; cf. R. 750, 1193), and almost invariably competition was in terms of price, rather than quality (R. 1100-1104; 1190-1193).

Sellers such as Utah Pie competed by selling a quality product below previously prevailing price levels and by selling identical pies, packed under different labels, even lower (*infra*, pp. 18-22, Pl. Ex. 4; R. 67, 1530, 1548-1566; R. 2517). Other sellers sought to meet these prices by reducing the weight of their brand name pies (as did Continental, R. 103) or by marketing a light-weight second label (as did Pet, R. 1103). Some sellers, the record suggests, reduced the quality of their products in order to compete (R. 1208). Carnation sought to compete with a high quality, full-weight pie, at a high price (*Ibid.*).

2. Carnation Was Unsuccessful in Its Competitive Efforts.[1]

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[1]The Court of Appeals' statement of facts as to Carnation appears at pp. 1484-1493 of the record.

Carnation began in 1955 to produce frozen pies at its plant in Torrance, California (R. 1202-1203). From 1958 through 1961 it marketed its "Simple Simon" brand pies in each of the eight separate western markets—Los Angeles, San Francisco, Portland-Boise, Seattle, Spokane-Butte, Phoenix, Salt Lake City and Denver, and in the middle west (R. 1186, 1189-1193; Pl. Exs. 64, 65, 66; R. 454, 2331-2508). At first it priced its pies by a set of "zone price lists," each list affecting several markets (Pl. Exs. 64, 65, 66; R. 454, 2331-2508). The lists all "tried to reflect the transportation charges and everything else," but because of competition, "about a month later they were no good" (R. 1203-1204).

Carnation attempted to meet competition, first, by changing the price lists (*Ibid.*), and later, by adopting a flexible system of short-term market-by-market merchandising "deals" or allowances (R. 1173-1174; Exs. C-B, C-C, C-D, C-E, C-F; R. 470, 5722-5766). The "deals" were of several varieties (*Ibid.*), but the function of all was to "reduce our price" and thereby meet the competitive tactics of other manufacturers having a like aim (R. 1173; R. 455-456, 461-462, 466, 1485; compare Def. Exs. C-B, C-C, C-D, C-E, C-F; R. 470, 5722-5766).

Carnation's advertising allowances, for example, were paid only on proof of advertising but, as the allowances were designed to encourage lower prices to consumers, there was no requirement as to the size of the ad and the amount of the allowance was based on the quantity purchased, not the cost of the advertisement (Exs. C-B, C-C, C-D, C-E, C-F; R. 470, 5722-5766; cf. R. 197-198, 717). For "a line ad" the grocer could receive an allowance of up to $1800 for every truckload[1]

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[1]A truckload of Simple Simon pies consists of 3000 cases of six pies each (R. 1180-1181).

of pies purchased the week of the ad (R. 462; Ex. C-E; R. 470, 5748, 5754). Generally, grocers performed simply by including a reference to the pie in their regular weekly newspaper ad, at no additional expenditure (R. 716-717).

In the Salt Lake market, Utah law (§13-5-7 UTAH CODE ANNOTATED (1953) see Appendix A) was construed to require grocers to resell their goods at 6 per cent above "invoice cost."[1] Accordingly, Carnation used "off-the-face"[2] deals to meet competitive pricing (R. 467, 1178; Ex. C-F; R. 470, 5760-5766). But "off-the-face" and "advertising" allowances "accomplishe[d] the same thing" — getting "pies to the consumer at a lower price" (R. 461, 462, 466-467).

Since deals were directed at local competitive conditions, they differed in duration, type and amount in each market area, so that Carnation's net prices in each of the market areas also frequently differed (R. 1173-1174, 1175-1176; Exs. C-G, C-H, C-I, C-J, C-K, C-L, C-M, C-N; R. 1001, 5767,5774).[3] At times during the period 1958 through 1961, Carnation's net prices in the Utah area were higher than those charged in the San Francisco area and elsewhere and at times they were lower. There was no relationship between the prices in any two areas (Exs. C-G, C-H, C-I, C-J, C-K, C-L, C-M, CN; R. 1001, 5767-5774).

---

[1]As advertising allowances were paid subsequent to invoice, they were not reflected as an "invoice cost."

[2]"Off-the-face" and "off-invoice" refers to allowances deducted "off the face" of the invoice to the purchaser. (See e.g., Ex. C-F; R. 470, 5760.)

[3]In reproducing these exhibits for the Supreme Court record, the printer altered the color in which the names of the particular markets (e.g., Northern California on Ex. C-H) were printed. On the originals, the names of these markets all appear in red, indicating that the red line on each of the graphs represents the amount per dozen which Carnation's price in the particular market exceeds, or is exceeded by, Carnation's price in Salt Lake City.

As it turned out, Carnation's deals did not lower its prices enough. Unlike some of its competitors, Carnation did not compete by selling a private or second label, and it refused to reduce the weight or quality of its pie (R. 1208). In its attempts to meet the competition of Pet Ritz, Swiss Miss, Morton, Utah, Frost 'N Flame, Banquet, County Fair, Johnston, Mary Elizabeth, Frigid Dough, Chet's, Bradley's and numerous other brands in the western markets,, Carnation stressed *quality* (R. 1177; Pl. Ex. 71; R. 458, 2523), yet in all the markets *price* became the competitive criterion on eight-inch pies (R. 1100-1104, 1177, 1190-1193, 2519-2521). Carnation's prices were generally higher than those of its competitors (R. 1177; Exs. M-17, M-18, M-19; R. 609, 611, 614).[1] Nowhere did Carnation possess a commanding market share (R. 1190-1193). In two major western markets, Seattle and Denver, Carnation was "just about extinct" at the time of trial (R. 1177, 1192), and in the largest market, Los Angeles, where its manufacturing plant was located, its distribution in 1961 was described as "very poor" (R. 2520). By the time of trial, Carnation was simply "trying to maintain some business until we can come out with a new item" (R. 1209).

3. At All Times Competition in the Salt Lake Market Was Vigorous. Utah Pie Was the Price Leader and the Dominant Seller. Carnation's Market Share Declined.

The Salt Lake market developed a competitive pattern similar to most of the others; it was "an aggressive price market" with "very little brand loyalty" (R. 1193). Prices steadily declined from 1958 through 1961 and competition increased (Ex. A-88; R. 1100, 5845; R. 1104-1106). Some

[1]Exhibits M-17, M-18 and M-19, graphs depicting prices of the parties to this action in the Salt Lake market and prices of respondents in other western markets, were not printed in the transcript of record. The original exhibits are in the possession of the clerk of this Court.

eighteen brands, in addition to Simple Simon, were advertised in the market from 1958 to 1961 (Ex. A-27; R. 893, 5824). The smaller sellers were often national manufacturers (e.g., Libby's, Swanson's, Chet's, Johnston's) who were "in the market" with other products and "ready to sell [pies] . . . as soon as the price is right" (*Ibid.*; R. 1105). Only in one respect was the Salt Lake market unique among western markets—the presence, in exceptional strength, of the Utah Pie Company (R. 1193).

Utah Pie Company, a Utah corporation owned and operated by the Rigby family, had been in the fresh pie business since the 1920's (R. 524). Faced with declining volume and a substantial loss in the fresh pie business in its fiscal year ending October 31, 1957, and attracted by the new consumer demand created by the selling and advertising efforts of Carnation and other producers who had pioneered the frozen pie industry, Utah Pie began producing frozen pies late in 1957 (R. 524; Ex. A-46; R. 997, 5847, 5850; R. 1202, 1203). Its pies were at all times eight inches in diameter, 24 ounces in weight and substantially equivalent to Simple Simon in grade and quality; but they were distributed under a variety of labels, and at a variety of prices (R. 175, 212, 216, 511, 971; Pl. Ex. 4; R. 67, 1530-1655).

In the Salt Lake market Utah Pie enjoyed important advantages over its competitors. It had a good name in the local community, low overhead and the ability to deliver in small quantities, quickly and at no extra cost (R. 202, 229, 694-695, 713-714, 878). Buyers for two major grocers testified that, price and quality being equal, they would prefer Utah Pie to any other seller (R. 694-695, 713-714). Nevertheless, Utah Pie entered the market at a price well under competition and was easily bluffed by buyers' talk down to prices

still lower (R. 882-884; Def. Ex. A-38; R. 1100, 5845).

a. *The market in* 1958.

Carnation's lowest offered price on apple[1] pies in the fall of 1957 was $4.66 per dozen; petitioner's "Utah" brand entered at $4.15 (Pl. Ex. 65; R. 454, 2368, 2370; Ex. C-F, R. 470, 5760; Pl. Ex. 4; R. 67, 1530, 1535), a price petitioner's sales manager (and one man sales force) euphemistically described as "a few pennies" under competition (R. 878).

In 1958, petitioner's first full year in the business, it captured 66.5 per cent of the market by prices (on apple pie, for example) which ranged from 68 cents to $1.00 per dozen below its closest competitor (Table II, *infra;* Ex. A-35; R. 1065, 5827, 5829, 5835-5844). Carnation, whose sales volume was cut nearly in half from the previous year (Ex. C-O, R. 1163, 5775) had only 10.3 per cent of the market (Ex. A-35; R. 1065, 5827, 5829).

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[1]Apple is the biggest seller (Pl. Ex. 102; R. 587, 4608) and the price leader (Pl. Ex. 4; R. 67, 1530-1655; Ex. C-Q; R. 1164, 5779-5820). The picture of relative prices and price trends is the same for apple as for other flavors (*Ibid.*).

TABLE I

Lowest Offered Prices* of One Dozen Apple Pies in the Salt Lake Market, 1958

(Sources: Pl. Ex. 65; R. 454, 2368, 2370-2376; Ex. C-F; R. 470, 5760; Pl. Ex. 4; R. 67, 1530, 1535-1539).

	Simple Simon	Utah
JAN	4.66	4.15
FEB	4.82	4.30
MAR	4.82	4.30
APR	4.82	4.00
MAY	4.82	4.00
JUNE	4.82	4.00
JULY	4.82	4.00
AUG	4.82	4.00
SEPT	4.82	4.00
OCT	4.82**	4.00
NOV	4.82**	4.00
DEC	4.82**	4.00

*Carnation's "lowest offered price," unlike Utah Pie's, was available only on purchase of a "full truck" or 3000 cases (Pl. Ex. 65; R. 454, 2368). Since this rarely occurred (Ex. C-S; R. 1165, 5822), the table understates Carnation's true selling price. See Table II.

**Carnation's invoices reveal that the deals represented at R. 5761 for the period 10/1/58 through 12/31/58 are in error. (R. 1166; Ex. C-Q; R. 1164, 5779, 5784-5785; Ex. A-35; R. 1065, 5827, 5839; Ex. A-38; R. 1100, 5845) The prices shown on Table I are correct.

TABLE II

Median Sales Prices of One Dozen Apple Pies in the Salt Lake Market, 1958

(Source: Ex. A-35; R. 1065, 5827, 5835-5844)
— = Lowest prevailing price

	Simple Simon	Utah	Pet Ritz	Morton
JAN	4.84	4.16	4.94	4.94
FEB	5.08	4.30	5.00	5.16
MAR	5.00	4.30	5.00	5.16
APR	5.00	4.10	5.00	5.16
MAY	5.00	4.08	5.02	5.16
JUNE	5.00	4.08	5.08	-----
JULY	5.00	4.08	5.10	5.16
AUG	5.10	4.08	5.04	-----
SEPT	5.02	4.08	5.02	-----
OCT	5.00	4.06	5.04	-----
NOV	5.00	4.06	5.04	5.16
DEC	5.00	4.00	5.00	-----

b. The Market in 1959

Led by Mary Elizabeth and Libby brand pies, both of which received extensive advertising in the Salt Lake City newspapers (Ex. A-27; R. 893, 5824), sellers not parties to this action increased their overall volume from 3,137 dozens in 1958 to 20,911 dozens in 1959, and increased their combined share of a market which virtually doubled, from 5.5% in 1958 to 18.7% in 1959 (Ex. A-35; R. 1065, 5827, 5829-5830).

In the same year, Pet Milk Company introduced a private label, Bel-air, for exclusive sale through Safeway Stores, one of the market's largest buyers (Pl. Ex. 42; R. 1054, 2226; Ex. A-35; R. 1065, 5827, 5835-5844). Bel-air, made from a different formula than the Pet-Ritz pie, was priced competitively with the "Utah" brand (Ex. A-38; R. 1100, 5845; R. 510), and it proved to be an extremely effective competitor. Its sales of 25,462.5 dozens in 1959 were nearly three times those of Simple Simon and accounted for a full 22.8 per cent of the market, even though sold in only one chain and in only four flavors (Ex. A-35; R. 1065, 5827, 5830).

These sales efforts took their toll on petitioner, whose share of the rapidly expanding frozen pie market declined from 66.5 per cent in 1958 to 34.3 per cent in 1959. The difference, of 32.2 per cent, was almost exactly matched by the 13.2 per cent increase of the "all other" sellers and the 19.1 per cent increase in the overall sales of respondent Pet. Carnation, still selling from 34c to 46c per dozen above the lowest market price, fared even worse: its market share sunk to 8.6 per cent (Ex. A-35; R. 1065, 5827, 5829-5830; Table IV, *infra*).

TABLE III

Lowest Offered Prices of One Dozen Apple Pies in the Salt Lake Market, 1959

(Source: See Table I, *Supra*)

	Simple Simon	Utah
JAN	4.22	4.00
FEB	4.22	4.00
MAR	4.22	4.00
APR	4.22	4.00
MAY	4.22	4.00
JUNE	4.22	4.00
JULY	3.90	3.90
AUG	3.90	3.60
SEPT	3.90	3.60
OCT	3.90	3.50
NOV	3.70	3.50
DEC	3.70	3.60

TABLE IV

Median Sales Prices of One Dozen Apple Pies in the Salt Lake Market, 1959

(Source: See Table II, *Supra*)

— = Lowest prevailing price

	Simple Simon	Utah	Pet Ritz	Bel-air	Morton
JAN	4.46	4.08	4.48	-----	-----
FEB	4.44	4.08	4.44	3.98	-----
MAR	-----	4.08	4.46	3.98	-----
APR	4.60	4.00	4.44	-----	-----
MAY	4.44	4.00	4.44	3.98	-----
JUNE	4.44	4.00	4.44	3.98	4.60
JULY	4.12	4.00	4.36	3.70	-----
AUG	4.18	3.84	4.28	3.88	-----
SEPT	4.20	3.80	4.28	3.88	-----
OCT	4.20	3.76	4.28	3.88	-----
NOV	4.12	3.70	4.26	3.88	-----
DEC	4.14	3.70	4.26	3.88	-----

c. The market in 1960.

Utah Pie rarely sold its "Utah" brand at a uniform price to all grocers (Pl. Ex. 4; R. 67, 1530-1655). The large chains and wholesalers (Associated Grocers, Safeway, Utah Wholesale Frozen Foods, and Grand American Markets) were generally given a preferred price without reference to quantity purchased at a particular time, and when petitioner introduced a price cut, they were generally its first beneficiaries (*Ibid.*; see in particular R. 1536-1540, 1544, 1542, 1543, 1541, 1545-1547).

In 1960 petitioner compounded these practices by the introduction of a controlled[1] label, "Frost 'N Flame" for exclusive sale through the largest buyer in the area, Associated Grocers (R. 212-213). Although concededly "the same pie" as the Utah brand but with a different label, Frost 'N Flame was introduced in March, 1960, at 50c to 70c per dozen less than the Utah brand, a differential which persisted throughout the period of this lawsuit (*Ibid.*; Pl. Ex. 4; R. 67, 1530, 1547-1557, 1559).

Frost 'N Flame apple pies were introduced at $3.00 per dozen, the lowest price the Salt Lake market had ever heard of, and they held at substantially that level through 1961 (Ex. A-35; R. 1065, 5827, 5841; Ex. A-38; R. 1100, 5845). In 1960, its first year, Frost N' Flame actually outsold the "Utah" brand; and aided also by additional sales of Bel-air pumpkin and mince pies, which Utah Pie began to sell to Safeway

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[1]A controlled label is owned by the manufacturer but sold through only one buyer (R. 212-213), whereas a private label is owned by the buyer and may be manufactured by more than one seller (R. 1138-1140). The effect of the controlled label is to tie the purchaser to a single supplier, and that is precisely what happened with Associated Grocers and Utah Pie (R. 212-213; Ex. C-R; R. 1165, 5821).

that year,[1] petitioner's sales volume doubled and its share of the fast-growing market rebounded to 45.5 per cent (Ex. A-35; R. 1065, 5827, 5830-5831).

The principal victims of this resurgence by Utah Pie were the "all other" sellers, who dropped from 18.7 per cent in 1959 to 12.7 per cent in 1960, and Pet which fell from its high of 35.5 per cent in 1959 to 27.9 per cent in 1960 (*Ibid.*).

Unable to compete with the so-called "economy" pies being promoted widely throughout the country, Pet in the latter part of 1960 introduced an economy pie of its own, the "Swiss Miss" label (Pl. Ex. 61; R. 436, 2275-2322; Ex. A-35; R. 1065, 5827, 5843). A 20-ounce pie, Swiss Miss underpriced the entire market with the exception of petitioner's 24-ounce Frost 'N Flame (Ex. A-38; R. 1100, 5845); and its large volume in the latter part of the year mitigated what would otherwise have been a disastrous loss of market share for Pet (Ex. A-35; R. 1065, 5827, 5831). In the spring of 1960, Continental reduced its "Morton" pie to 22 ounces and was able to sell a small quantity of pies that fall at a correspondingly lower price (R. 103, 199, 1103, 5674; Ex. A-35; R. 1065, 5827, 5831, 5842; Ex. A-38; R. 1100, 5845).

In 1960, the Salt Lake market experienced the principal competitive weapons responsible for lowering the price structure—controlled labels and their principal antagonist, light weight pies. Carnation sold neither. It attempted to compete with high quality and a high price, and met only with low demand.

In late February and early March, 1960, in an effort to regain business in the Salt Lake and other markets where "our

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[1] In a letter to Safeway's buyer, Gaylen Rigby, petitioner's sales manager, referred to petitioner's 1960 Bel-air prices as "rock bottom" in order to "introduce our product." Although Rigby assured Safeway that its Bel-air price differences were cost justified, he raised the prices the following year (Exs. M-73, M-76, M-78; R. 843, 5568, 5574, 5578).

market position was very weak," Carnation made a special offer, of limited quantity and three weeks' duration (R. 1174-1175; Ex. C-F; R. 470, 5760, 5761). This brief attempt to halt the trend of decreasing market shares placed Carnation's price, for the first and last time, below the lowest price of petitioner. (See Tables I and III, *supra*, and Tables V and VII, *infra*.) The effect of the offer was modest: the year's sales of Simple Simon climbed a bare 3.5 per cent, giving Carnation a total market share of 12.1 per cent (Ex. A-35; R. 1065, 5827, 5830-5831). Carnation's prices in the latter part of the year began a gradual rise which extended into 1961 and contrasted with the prevailing decline (Ex. A-38; R. 1100, 5845).

TABLE V

Lowest Offered Prices of One Dozen Apple Pies in the Salt Lake Market, 1960

(Source: See Table I, *Supra*)

	Simple Simon	Utah	Frost 'n Flame
JAN	3.90	3.50	
FEB	3.00	3.50	
MAR	3.00	3.50	3.00
APR	3.48	3.50	3.00
MAY	3.48	3.50	3.00
JUNE	3.48	3.35	3.00
JULY	3.71	3.50	3.00
AUG	3.95	3.50	3.00
SEPT	3.95	3.50	3.00
OCT	3.95	3.50	3.10
NOV	3.91	3.50	3.10
DEC	3.91	3.50	3.10

TABLE VI

Median Sales Prices of One Dozen Apple Pies in the Salt Lake Market, 1960

(Source: See Table II, *Supra*)

— = lowest prevailing price

	Simple Simon	Utah	Frost 'n Flame	Pet Ritz	Bel-air	Swiss Miss	Morton
JAN	4.04	3.70	.....	4.28	3.58	.....	.....
FEB	4.00	3.70	.....	4.12	3.66	.....	.....
MAR	3.88	3.70	3.00	4.12	.....	.....	.....
APR	3.82	3.70	3.00	4.04	3.66	.....	.....
MAY	3.88	3.70	3.00	4.24	3.66	.....	.....
JUNE	3.86	3.70	3.00	4.06	3.66	.....	.....
JULY	4.12	3.70	3.00	4.20	3.66	.....	.....
AUG	4.12	3.70	3.00	4.24	3.66	3.30	.....
SEPT	4.06	3.70	3.10	4.28	3.66	3.28	.....
OCT	4.22	3.70	3.04	4.48	3.66	3.30	.....
NOV	4.54	3.70	3.10	4.50	3.66	3.36	3.20
DEC	4.22	3.70	3.10	4.58	3.66	3.32	.....

d. *The Market in* 1961.

In 1961, while Utah, Frost 'N Flame, Bel-air, Swiss Miss and Morton engaged in a fierce price war that triggered the filing of this suit, Carnation's prices rose well above the prevailing market level (Ex. A-38; R. 1100, 5845). Frost 'N Flame, still the identical pie as the Utah brand, continued to be the price leader, and boosted petitioner's sales to Associated Grocers by one-third to more than 50,000 dozen (*Ibid.;* Ex. C-R; R. 1165, 5821).

In June, Continental, which had been virtually extinct in the market, reduced the price of its 22-ounce Morton brand to

$2.85, the ounce-for-ounce equivalent of the $3.10 price of the heavier Frost 'N Flame (R. 201-202, 828). Although the Morton price was only a two-week spot offer and was available only in full truck quantities (R. 202, 695; Ex. A-38; R. 1100, 5845), petitioner reacted by slashing both its Utah and Frost 'N Flame prices on all quantities, to $2.75 where they remained for two months (R. 229, 736; Pl. Ex. 4; R. 67, 1530, 1557-1559). In December, Utah Pie again cut its prices on both brands to $2.90 where they remained into 1962 (Pl. Ex. 4; R. 67, 1530, 1560-1561). In August, petitioner introduced a second private label, "Mayfresh" for exclusive distribution (through Utah Wholesale Frozen Foods) to Grand American Markets, another major buyer—at Frost 'N Flame prices—and has since offered other private labels to other large buyers, all of the same quality and price as Frost 'N Flame (R. 817-820; Pl. Ex. 4; R. 67, 1530, 1559-1561; Ex. M-66; R. 819, 5560).

Petitioner's 1961 price cuts retained its 45 per cent market share, and Morton's spot offer (and one later on) gave it for the first time a measurable sales volume (Ex. A-35; R. 1065, 5827, 5832). Carnation made no sales to Safeway, lost volume at Utah Wholesale Frozen Foods, and with pies priced as much as $1.82 per dozen above its competitors, dropped to a market share of 8.8 per cent (Ex. C-R; R. 1165, 5821; Ex. A-35; R. 1065, 5827, 5882; Table VIII, *infra*, p. 22). In 1962, Carnation virtually disappeared from the market (Ex. C-O; R. 1163, 5775, 5776).

TABLE VII

Lowest Offered Prices of One Dozen Apple Pies in the Salt Lake Market, 1961

(Source: See Table I, *Supra*)

	Simple Simon	Utah	Frost 'N Flame	May-fresh
JAN	3.46	3.43	3.10	
FEB	3.46	3.50	3.10	
MAR	3.46	3.50	3.10	
APR	3.46	3.50	3.10	
MAY	3.46	3.40	3.10	
JUNE	3.46	2.75	2.75	
JULY	3.46	2.75	2.75	
AUG	3.46	2.75	2.75	3.10
SEPT	3.60	3.40	3.10	3.10
OCT	3.60	3.40	3.10	3.10
NOV	3.60	3.40	3.10	3.10
DEC	3.60	2.90	2.90	2.90

TABLE VIII

Median Sales Prices of One Dozen Apple Pies in the Salt Lake Market, 1961

(Source: See Table II, *Supra*)

— = Lowest prevailing price

	Simple Simon	Utah	Frost 'N Flame	Pet Ritz	Morton
JAN	4.46	3.70	3.00	4.48	.....
FEB	4.46	3.70	3.10	4.28	3.38
MAR	4.40	3.70	3.10	4.24	.....
APR	4.40	3.70	3.10	4.28	3.40
MAY	4.40	3.68	3.10	4.48	.....
JUNE	4.40	3.28	2.80	4.64	2.85*
JULY	4.56	3.20	2.74	4.48	2.85*
AUG	4.40	3.20	2.74	4.48	.....
SEPT	4.48	3.60	3.10	4.48	.....
OCT	4.46	3.60	3.10	4.46	.....
NOV	4.46	3.60	2.74	4.48	.....
DEC	4.40	2.90	2.90	4.50	2.85*

*Morton's $2.85 price offered an option of $2.55 f.o.b. its plant in Watsonville, California (R. 828).

Other than price lists and deal announcements by the shovelful (Pl. Exs. 41, 64, 65, 66, 129, 130; R. 2223, 2331-2508, 5348-5370), petitioner made no attempt in the trial court to introduce documentary evidence as to Carnation's selling prices in the Salt Lake market or elsewhere on any particular date. Not once, in the entire trial, could petitioner point to any sale of Simple Simon pies as the cause of any of its alleged injury; nor, *a fortiori*, did it produce evidence of contemporaneous, discriminatory sales which had produced the claimed harm.

Virtually all of the documentary evidence in the case was prepared by respondents, including IBM runs of Utah Pie and Carnation invoices (Pl. Exs. 4, 91; R. 67, 551, 1530-1655, 4420-4585; Ex. C-Q; R. 1164, 5779-5820); a complete list of all Carnation deals in the western markets (Exs. C-B, C-C, C-D, C-E, C-F; R. 470, 5722-5766); numerous graphs comparing net prices among sellers in the Salt Lake market and in each of several other markets (Exs. M-17, M-18, M-19; R. 609, 611, 614; original exhibits in custody of Clerk of this Court) and comparing prices of each seller as between different markets (Exs. C-G, C-H, C-I, C-J, C-K, C-L, C-M, C-N; R. 1001, 5767 5774); a comprehensive study of volume and market shares in the Salt Lake market prepared by an economics professor at Utah State University (Pl. Ex. 62; R. 437, 2323-2326; Ex. A-35; R. 1065, 5827-5844); surveys of advertisements in the Salt Lake City newspapers (Ex. A-27; R. 893, 5824; Ex. M-56; R. 717, 5539-5556); and data as to plaintiff's earnings, profits, salaries, etc. prepared by a certified public accountant (Ex. A-46; R. 997, 5847-5858).

These studies established in many ways petitioner's extended market dominance and the vitality of its business. From 1958 through 1961 Utah and Frost 'N Flame were adver-

tised in the Salt Lake City newspapers a total of 178 times, Associated Grocers advertising Frost 'N Flame almost exclusively; Simple Simon was advertised only 45 times in the same period (Ex. A-27; R. 893, 5824). The three dominant buyers accounted for 92.2 per cent of petitioner's sales; they accounted for only 65.3 per cent of Carnation's (Ex. C-R; R. 1165, 5821). Spread largely among smaller customers, 77 per cent of Carnation's sales volume was in quantities of one-quarter truck or less, the highest price brackets, and above the median price shown on Tables I, III, V and VII, *supra* (Ex. C-S; R. 1165, 5822).

Utah Pie Company's books showed that for the fiscal year 1957, the last year in which it was engaged solely in the fresh pie business, it lost some $5,400 (Ex. A-46, Statement of Adjustments to Net Income Per Books; R. 997, 5847, 5850-5851). In its fiscal year 1958, when it seized 67 per cent of the market through its price-cutting activities, it had an operating loss of some $1,200 (*Ibid.*). During each of the fiscal years 1959, 1960 and 1961, it showed a substantial profit (*Ibid.*). In 1961, the year it filed suit, its net income after taxes was 14.4 per cent of its net worth, even though it had substantially increased the salaries and bonuses paid the members of the Rigby family who own the corporation (*Ibid.*).

Perhaps the most significant evidence of Utah Pie's market power is the study of market shares (Pl. Ex. 62; R. 437, 2323-2326), prepared by Drs. Anderson and Lamborn of Utah State University. The study demonstrates that petitioner remained the dominant seller in the Salt Lake market throughout the period in controversy, and Carnation's strength diminished. Overall, Utah Pie accounted for 45.3 per cent of the pies sold in this market, Carnation a bare 10 per cent. The "all other" sellers grew, and to the extent they were reduced from their high of 18.7 per cent in 1959, their lost market

share was assumed primarily by Utah Pie. The market itself grew four-fold in these four years, and the volume of the "all other" sellers in 1961 was six times their volume in 1958.

TABLE IX

Sales Volumes of Major Sellers of Frozen Pies in the Salt Lake Market, 1958-1961 (Dozens)

(Source: Pl. Ex. 62; R. 437, 2323-2326)

	1958	1959	1960	1961
Utah Pie	37,969.5	38,372	83.894.0	102,690.0
Pet	9,336.5	39,639	51,480.0	66,786.0
Carnation	5,863.0	9,625	22,371.5	20,067.0
Morton	754.0	3,182	3,350.0	18,799.5
Other	3,137.0	20,911	23,473.5	18,565.5
Total	57,060.0	111,729	184,569.0	226,908.0

TABLE X

Market Shares of Major Sellers of Frozen Pies in the Salt Lake Market, 1958-1961

(Source: See Table IX)

	1958	1959	1960	1961
Utah Pie	66.5	34.3	45.5	45.3
Pet	16.4	35.5	27.9	29.4
Carnation	10.3	8.6	12.1	8.8
Morton	1.3	2.9	1.8	8.3
Other	5.5	18.7	12.7	8.2
Total	100.0%	100.0%	100.0%	100.0%

TABLE XI

Market Shares of Major Sellers of Frozen Pies in the Salt Lake Market, 1958-1961

(Source: See Table IX)
Flavors of apple, cherry, boysenberry, peach, pumpkin and mince only.*

	1958	1959	1960	1961
Utah Pie	67.3%	34.3%	45.7%	45.8%
Pet	16.2	35.3	27.8	29.6
Carnation	9.7	8.6	12.0	8.1
Morton	1.3	2.9	1.8	8.4
Other	5.5	18.9	12.7	8.1
Total	100.0%	100.0%	100.0%	100.0%

*Limited to the six flavors involved in this action.

Based upon all of this evidence, the Court of Appeals ruled that the evidence was insufficient to support the verdict in favor of Utah Pie and against Carnation, and remanded with instructions to enter judgment in favor of respondent.

SUMMARY OF ARGUMENT

With respect to the three questions posed by the Court, it is submitted that:

1. The answer to the first is no, as Rule 50(c)(2) applies only at the trial level if a motion for judgment n.o.v. is granted by the trial court. If applied after appeal where, as here, the appellee has not followed the 50(d) procedure, it would open up an unending process of reversal by the appellate court, followed by a new trial ordered by the trial court without the appellate court being able to end the controversy unless the trial court concurred. Hearing on Carnation's post-trial motions and the spurned authorization of Rule 50(d) af-

forded both the trial court and Utah Pie full opportunity to correct their errors before appeal, as suggested in *Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212 (1947).

2. The ruling of the Court of Appeals was clearly compatible with the cases cited by this Court in its question no. 2 for the same reasons.

3. The Court of Appeals has the power, pursuant to section 2106 of Title 28, United States Code, and under the decisions of this Court, to direct the entry of judgment for Carnation under the procedural facts as exist in the case at bar. Rule 50(d) places no limitation on such power.

Petitioner in its brief concedes the correctness of these contentions, except that it suggests it might be entitled to a new trial on the issue of alleged discriminatory prices in the Denver market. This contention, as petitioner admits in its brief, does not involve Carnation in any respect. Petitioner further concedes that no evidence which should have been admitted was erroneously excluded by the trial court. Accordingly, the principle of *Weade v. Dichmann Wright & Pugh, Inc.*, 337 U.S. 801 (1949) has no application to Carnation.

The Court of Appeals correctly concluded that petitioner failed to prove as to Carnation either price discrimination or the requisite adverse effect on competition.

Failing to find discrimination in Carnation's pattern of varying prices in different and unrelated markets, reflecting varying competitive conditions ,petitioner has shifted its focus to claim a difference between Carnation's list prices in the San Francisco market (without considering advertising allowances used in that market as a merchandising method to reduce prices), and its net prices in the Salt Lake market (after deducting the off-invoice merchandising allowance employed

there). The Court of Appeals accurately determined that the economic effect of the two types of allowances was the same — to induce the retailer to purchase and advertise Carnation pies and thereby meet the competitive tactics of other manufacturers having a like aim.

The record showed no competitive injury resulting or likely to result from Carnation's sporadic and intermittent price differences in wholly different and unrelated markets. Carnation's own market share declined in the Salt Lake market; its position in that market was always minor; the sales of Utah Pie and other competitors grew, both absolutely and in relation to Carnation; all competitors in the market engaged in strong price competition; customers in the market switched from seller to seller as private labels and cheaper pies were introduced; entry into the market was simple and cheap; competition was keen. Yet Utah Pie was able, by price cutting and discriminatory pricing added to its natural advantages of location, to secure and continuously maintain a dominant position in the market. Carnation's competitive efforts in this dynamic market resulted only in a declining market share, lost volume and lost profits.

The record clearly showed that there was no nexus between Utah Pie's own price cuts and Carnation's prices, either in Salt Lake or in any other market, that any decline in Utah Pie's market share from its near monopoly peak in 1958 went to other sellers, not Carnation, and that Utah Pie, despite its policy of undercutting every seller in the market, prospered and grew fourfold between 1957 and 1961.

Petitioner's thesis of liability based on bigness and potentiality is based on the misrepresentation that Carnation and the other respondents acted in concert, despite the fact that the jury found against Utah Pie on its claim of combin-

ation or conspiracy. Petitioner would also substitute the theory of *per se* liability rejected by this Court in *F.T.C. v. Anheuser-Busch, Inc.*, 363 U.S. 536 (1960), for the proof required by section 2(a) of the Robinson-Patman Act that a price difference is not unlawful unless it has the effect of injuring or substantially lessening competition or tending to create a monopoly. The evidence shows the only tendency toward concentration in the frozen pie industry is the local predominance secured by Utah Pie Company in the Salt Lake market by price cutting and discriminatory pricing practices. Carnation was beset with strong competition from national, regional, and local pie manufacturers in every market and had dominant power in none.

There is no evidence to support petitioner's claim of predatory intent or conduct on the part of Carnation. Cf. *Moore v. Mead's Fine Bread Co.*, 348 U.S. 115 (1954). Carnation had no monopoly or dominant power in any market, demonstrated no aggressive objectives toward Utah Pie or any other competitor, and did not engage in any deep, substantial undercutting of Utah Pie's prices. Carnation's pies were priced below Utah Pie's "Utah brand" only once (a short-term special offer in early 1960) and were always priced well above Utah Pie's Frost 'N Flame label pies which were of like grade and quality. *Federal Trade Commission v. Borden Company*, 383 U.S. 637, 16 L.ed.2d 153 (1966). In addition, Carnation's pies were priced consistently above all other brands in the Salt Lake market, except Pet Ritz. As a result, Carnation lost out with the three largest purchasers and suffered a declining market share in the Salt Lake market. Faced with price competition in every market in which it sold its eight-inch pies, Carnation's prices on eight-inch pies declined to a level below cost, after full allocation of overhead, in every market in which it attempted to sell its eight-inch pies.

The Court of Appeals, after viewing the evidence in the light most favorable to Utah Pie and according to it the benefit of all inferences the record fully supports, correctly concluded that the record "refutes a finding that Carnation, by price differences or other acts, had substantially lessened competition, or tended to create a monopoly, or injured, destroyed, or prevented competition with it in the Salt Lake City market, or that there was a reasonable possibility that Carnation, by price differences or other acts, would do so in the future, or that Carnation had taken or would take in the future any appreciable amount of frozen pie business from Utah Pie" (R. 1507).

ARGUMENT

I. THE MANDATE OF THE COURT OF APPEALS WAS WITHIN ITS POWER AND WAS APPROPRIATE TO THE FACTS IN THIS CASE.

The Court in its order granting certiorari has requested the parties to brief three questions dealing with the application to the facts in this case of the 1963 additions to Rule 50 of the Federal Rules of Civil Procedure.

Consideration of these questions requires a brief statement of the procedural posture involved. At the close of Utah Pie's case and at the close of all the evidence Carnation and the other respondents each moved for directed verdicts which were not granted by the district court (R. 50, 1229). After judgments were entered for Utah Pie on the separate jury verdicts against each of the individual respondents on the section 2(a) counts,[1] each respondent filed, pursuant to Rule 50(b), a timely motion for a judgment n.o.v. or for a new trial (R. 50). These motions were summarily denied by the

[1]Utah Pie's claim of a conspiracy by all or some of the respondents to fix prices in the "Utah trading area" was rejected by the jury (R. 43) and Utah Pie took no appeal from this verdict.

trial court on March 4, 1963 (R. 58). No post-trial motion was made by Utah Pie with respect to its separate judgments against any of the respondents.[1]

Timely appeal was taken by each respondent to the Court of Appeals for the Tenth Circuit (R. 60). Utah Pie, as appellee, represented by experienced and able counsel, failed to assert to the Court of Appeals any grounds entitling it to a new trial as contemplated by Rule 50(c) (R. 5862) and made no assertion in its petition to this Court for a Writ of Certiorari that the mandate of the Court of Appeals should be modified to allow the trial court to determine whether Utah Pie should be entitled to a new trial as to any issue or as to any respondent.

The Court of Appeals found the evidence as to each respondent insufficient to go to the jury and reversed with instructions that judgment be entered for each respondent. Accordingly, it did not reach any of the errors urged by any respondent as grounds for a new trial. The Court found no reason to grant Utah Pie a new trial as to any respondent or to remand the case for determination by the trial court as to whether such a new trial should be granted.

A. Question No. 1. Whether, If This Court Affirms The Judgment and Order of The Court of Appeals Directing The District Court to Enter Judgment for Respondents, Petitioner Can Then Make a Motion For New Trial Under Rule 50(c)(2) of The Federal Rules of Civil Procedure Within Ten Days of The District Court's Entry of Judgment for Respondents?

Rule 50 deals primarily with motions to be made during

[1]The jury also returned a verdict for Continental against Utah Pie on Continental's counterclaim of a 2(a) violation by Utah Pie. Judgment was entered on the verdict but later set aside on motion by Utah Pie, although it had not made a motion for directed verdict. The Court of Appeals reversed and ordered a new trial on the counterclaim.

and at the conclusion of the original trial. Paragraphs (a) and (b) of Rule 50 state the procedure to be followed in moving for a directed verdict and for judgment notwithstanding the verdict. They make no mention of procedure to be followed on appeal. Paragraphs (c) and (d) of Rule 50 are concerned with appellate procedure, but only in relation to the disposition made by the trial judge of the motions made by the verdict loser for judgment notwithstanding the verdict or for a new trial. Paragraphs (c) and (d) clearly state whenever they apply to other than original trial court procedure. Rule 50 is part of the general subtitle of the rules governing TRIALS. Thus it is submitted that unless otherwise expressly stated, Rule 50 is concerned with motions made in the trial court during and immediately after the trial, and not with matters subsequent to an appeal.

Nowhere in Rule 50(c)(2) is there mention of appeal. Furthermore, Rule 50(c)(2) states that it applies when a party's "verdict" has been set aside, but no mention is made of reversal of judgment. This language clearly indicates that the Rule is meant to apply only to the case where the trial court *in the first instance* grants a motion for judgment notwithstanding the verdict. It is submittted that if Rule 50(c)(2) were intended to apply to a case where, as here, the trial court has *denied* a motion for judgment n.o.v., but the appellate court has held such ruling to be error, some express indication of that intent would be stated in the rule or in the comments of the rule makers.

Paragraphs (a) through (d) of Rule 50 are placed in chronological order. Paragraph (a) deals with a motion for directed verdict, paragraph (b) then deals with procedure to be followed if the motion for directed verdict is not granted by providing for a motion for judgment notwithstanding the verdict. Paragraph (c) prescribes the procedures to be followed

if the motion for judgment notwithstanding the verdict is granted, while paragraph (d) prescribes the procedure on appeal if the motion is denied. Thus, depending on the trial court's disposition of the motion under paragraph (b), either paragraph (c) or paragraph (d) applies, but not both.

It is significant that the Advisory Committee's note on subdivision (c) states that "subdivision (c) deals with the situation where a party joins a motion for a new trial with his motion for judgment n.o.v. or prays for a new trial in the alternative, and the motion for judgment n.o.v. is *granted.*" (Emphasis added) 28 U.S.C. Rules 34 to 51 (1965 Pocket Part) pp. 184-185. This clearly refers to original trial court procedure, and indicates that the Advisory Committee intended paragraph (c) of Rule 50 to apply only where the trial court originally granted the motion for judgment n.o.v. The note goes on to state that paragraph (c) (2) of Rule 50 deals with the same situation as does paragraph (c) (1).

If Rule 50(c) (2) is construed to authorize the loser on appeal to go back to the trial court and serve a motion for a new trial after the appellate court has found that the trial court should have granted the motion for a judgment n.o.v., then it is entirely possible that the judicial process would be infinite. The appellate court would have no power to end the controversy, for the trial court could choose repeatedly to grant motions for a new trial despite the mandate of the Court of Appeals.

No basis is found in the language of Rule 50 or in the decisions of this Court on which it is based to allow the loser on appeal a post-mandate motion for a new trial where the trial court in the first instance had not conditionally granted such a motion, or the appellate court, in the exercise of the discretionary power granted by 28 U.S.C. 2106, neither directed

the trial court to grant a new trial, nor directed it to determine if a new trial should be granted, but directed that judgment for appellant be entered. It would be extraordinary indeed to find that Rule 50(c)(2) made such an eventful change in procedure, with no mention in the rule of this change whatever.

Petitioner agrees with this analysis. At page 130 of its brief is stated:

> Indeed, if judgment is entered in the trial court in conformity with the mandate of the Court of Appeals, Utah Pie will not be a "party whose verdict has been set aside on motion for judgment notwithstanding the verdict . . ." within the language of Rule 50(c)(2). It will simply be a party against whom a final adverse judgment has been entered in conformity with the mandate of a Court of Appeals. The rule would seem to be literally inapplicable.

The Advisory Committee's notes on the 1963 amendments [5 MOORE'S FEDERAL PRACTICE § 50.01 at 148-149 (1965 Supp.)] with respect to subdivision (c) indicate that it was added to summarize the proper practice and procedure to be followed in making rulings on a motion for judgment n.o.v. and for a new trial and the consequences of the rulings thereon in light of this Court's decisions in *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243 (1940); *Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212 (1947); *Globe Liquor Co. v. San Roman*, 332 U.S. 571 (1948) and *Johnson v. New York, New Haven & Hartford Railroad*, 344 U.S. 48 (1952).

This Court stated in *Cone v. West Virginia Pulp & Paper Co., supra*, at p. 216 as a reason an appellate court could not enter a judgment setting aside a jury verdict without a motion for judgment n.o.v. being first made to the trial court under Rule 50(b):

> Determination of whether a new trial should be granted or judgment entered under Rule 50(b) calls

> for the judgment in the first instance of the judge who saw and heard the witnesses and has the feel of the case which no appellate printed transcript can impart . . . [citing cases] Exercise of this discretion presents to the trial judge an opportunity, after all his rulings have been made and all the evidence has been evaluated to view the proceedings in a perspective peculiarly available to him alone. He is thus afforded a "last chance to correct his own errors without the delay, expense or other hardships of an appeal."

Subsequently, this Court noted in *Fountain v. Filson*, 336 U.S. 681, 683 (1949) that one of the reasons for its holdings in the cases above cited was:

> . . . that otherwise the party who had won in the trial court would be deprived of any opportunity to remedy the defect which the appellate court discovered in his case. He would have had such an opportunity if a proper motion had been made by his opponent in the trial court.

Both of these reasons are met here. Both petitioner and the trial court were apprised of the errors committed below by the motions of each respondent under Rule 50(b) alternatively for a judgment n.o.v or for a new trial. All of these motions were summarily denied by the trial court while the case was fresh in its mind (hearing was had and rulings made less than two weeks after the conclusion of the jury trial). No suggestion was made by Utah Pie either when these motions were heard by the trial court or when it filed its brief in the Court of Appeals, that there was any reason to entitle it to a new trial if the jury verdict were to be set aside. The Court of Appeals held the case under advisement for nearly a year after oral argument and went so far as to order a new trial on Continental's counterclaim although Utah Pie had made no suggestion that it was entitled to such relief.

In light of this record, it is submitted that the trial judge, some four years after the trial, would not now be in any better position than was the Court of Appeals to consider whether Utah Pie should be given another chance to prove its case.

The trial court had its "last chance to correct his own errors" before the delay and expense of appeal when it acted on the motions for judgment n.o.v. or for a new trial timely made by each respondent. Utah Pie had its "last chance" when it deliberately ignored the opportunity afforded by Rule 50(d) to urge in its brief on appeal any basis for a new trial as to any respondent if the judgments below should be reversed by the Court of Appeals. If the interest of justice is to be served, there should be an end to litigation after each party has been afforded full opportunity at both the trial and appellate level to present its case.

Petitioner did not even suggest to the trial court or to the Court of Appeals that there was any reason to grant it a new trial on any issue. Utah Pie lost its conspiracy charge to the jury (R .43). Its counsel, after having had rulings as to evidence and trial procedures by the trial judge in its favor with almost monotonous consistency from beginning to end [see *infra* pp. 37-40], did not venture to ask that same trial judge for a new trial on the conspiracy issue or to appeal from that judgment—although in this Court and in the Court of Appeals petitioner persistently refers to "the respondents" in the plural as if they had acted in concert. [E.g., Petitioner's Brief, pp. 59, 62, 64, 80-81, 141.]

The record amply demonstrates why petitioner made no suggestion, as authorized by Rule 50(d), to the Court of Appeals that it be given a chance at a new trial if that court should reverse the judgments below. The trial court allowed

Utah Pie to explore every theory of price discrimination the fertile imagination of counsel could conjure up. The opinion of the Court of Appeals sums up Utah Pie's peregrinations in search of a basis to support its claim as follows:

> Throughout the proceedings Utah Pie shifted from theory to theory as to the basis for its claims of § 2(a) violations. In the complaint, the theory was lower prices in Utah than in other western states; at the pretrial, it was lower prices in six western states and higher prices in "another area"; at the trial, it apparently was lower prices in the Salt Lake City market (which we will hereafter define) and higher prices in the Los Angeles market; and the injunctive decree was apparently based on lower prices in five western states and higher prices in the entire state of California. Moreover, in Utah Pie's brief in No. 7308 [the Carnation appeal], Utah Pie relies on lower prices in five western states and higher prices in northern California. (R. 1452, Fn. 5.)

The trial court allowed Utah Pie to explore every innuendo in the complaint and pursue every avenue the evidence suggested, cf. *Weade v. Dichmann Wright & Pugh, Inc.*, 337 U.S. 801 (1949); and the Court of Appeals gave full consideration to Utah Pie's theory, first postulated in its brief to that Court, as to Northern California being the locale of the elusive and ambulatory "high leg" of Carnation's pricing (R. 1490).

In addition, whatever errors the trial court committed (beyond allowing the case to go to the jury in the first place) were all in favor of Utah Pie Company. In its rulings on evidence, the court consistently excluded documentary evidence offered by respondents, although it allowed similar evidence by petitioner, despite objection of counsel (R. 457). It allowed Utah Pie's sales manager to give his opinion as to various aspects of the nature of the market for frozen fruit pies (R. 561-568), but excluded, as opinion, testimony of other sales

personnel and outside pie buyers familiar with the market as to similar matters (R. 195, 700, 720,721, 724). In its instructions to the jury, the trial court adopted all of the requests of petitioner's counsel which gave only lip service to the literal language of section 2(a) of the Robinson-Patman Act, but uniformly refused requests for instructions by counsel for each respondent which attempted to relate the issues of fact to the complex legal-economic issues of injury to competition and good faith meeting of competition[1] — issues which have given the courts and the Federal Trade Commission difficulties in interpretation and application in the thirty years of the Robinson-Patman Act.[2]

The trial court required the separate and independent section 2(a) claims against each individual respondent to be tried *en masse*. The problem this created for the jury caused the Court of Appeals to comment:

> Utah Pie's conspiracy claim and § 2(a) claims and Continental's counterclaim were all tried at the same time. The portions of the evidence pertinent to

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[1]The trial court's instructions to the jury used the bare bones of the statutory language at least ten times (R. 1347, 1353, 1354(2) 1355, 1361. 1364, 1397, 1398(2), 1399) without ever (except to parrot Utah Pie's theory R. 1355) giving the jury any information as to how to decipher the difficult legal-economic concept of injury to competition—the issue as to which the Court of Appeals found petitioner's evidence to be insufficient. The trial court also refused to instruct the jury on the difference between "injury to competition" and "injury to a competitor." [Defendant's Proposed Instructions 10 (R. 1428) and 15 (R. 1430.] *Atlas Building Products Co. v. Diamond Block & Gravel Co.*, 269 F.2d 950, 954 (10th Cir. 1959), *cert. den.* 363 U.S. 843 (1960). In addition, the adverse effect of the court's slanted instructions on meeting competition (R. 1356, 1362, 1386) was compounded by allowing petitioner to introduce selected extracts from the minutes kept by the frozen food committee of Carnation Company, a committee of Carnation executives which determines pricing policy in each locality, but refusing Carnation's offers to induce the entire set (R. 457-458).

[2]"This section [2(a)] of the Act admittedly is complicated and vague in itself and even more so in its context." *FTC v. Ruberoid Co.*, 343 U.S. 470, 483 (1951).

> all of such claims and the portions pertinent only to a particular claim were commingled and presented to the jury in mass. The jury's task of determining what evidence was pertinent to all of the claims and segregating those portions of the evidence pertinent only to the particular claims, respectively, was a most difficult if not an impossible one. Indeed, we found it very difficult so to do, when we had the printed transcript of the oral evidence and the written exhibits (either original or reproduced) before us, the benefit of the written briefs, and were able to proceed with due deliberation. (R. 1511)

Because of this confusion Carnation, which had only one label, which consistently priced its product at the highest level in the Salt Lake market and which was the one which lost most in the competitive battle for the business of the major buyers (R. 2323) was forced to try its case in an atmosphere of "fighting labels," "dive bombing on prices" and charges of "industrial espionage." The result was that even though Utah Pie failed to prove its Sherman Act charges, there was enough mud thrown to splatter all of the sellers in the market without any instructions from the court as to what evidence was to be considered as to each of the individual parties. This emotional atmosphere and the trial court's hostility toward all the respondents obviously aided Utah Pie and prejudiced each respondent in the presentation of its separate case to the jury. It is small wonder then that petitioner did not itself urge upon the Court of Appeals that it give consideration to a new trial for Utah Pie Company if any of the judgments below should be reversed. Such consideration would necessarily have required the appellate court to conclude that, in light of the record in the trial court, Utah Pie Company had had a full chance to prove its case under the most favorable circumstances and that its favorable jury verdict against each individual respondent was founded on

improper evidence and slanted instructions.[1] That record and the uncontradicted and uncontradictable documentary evidence that refutes any basis for Utah Pie to establish the requisite adverse effect upon competition reflects the soundness of the mandate of the Court of Appeals that the judgment in favor of Utah Pie on its 2(a) claims be reversed and remanded with instructions to enter judgment for each individual respondent.

B. Question No. II. Whether, if Under The Order of The Court of Appeals, Petitioner Cannot Make a Motion For New Trial Under Rule 50(c)(2) Within Ten Days of The District Court's Entry of Judgment Against Him, The Order of The Court of Appeals Directing The District Court to Enter Judgment for Respondents is Compatible With Rule 50(b) as Interpreted by This Court in Cone v. West Virginia Pulp & Paper Co., 330 U.S. 212; Globe Liquor Co. v. San Roman, 332 U.S 571; and Weade v. Dichmann, Wright & Pugh, 337 U.S. 801?

We respectfully submit that the order of the Court of Appeals was entirely compatible with Rule 50(b), as interpreted by this Court.

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[1]The trial court's instructions on the crucial issues of injury to competition and good faith meeting of competition effectively prevented any fair jury consideration. Except where specific matters favorable to Utah Pie's theories were emphasized, the instructions never went beyond the opaque language of the Robinson-Patman Act. The vice of this kind of charge to the jury is that it not only unfairly aids one side by emphasizing its contention, but suggests to the jury that the other side's contentions and evidence were irrelevant to the real issues. *Hall v. Weare*, 92 U.S. 728 (1875). To read the words of the antitrust laws and particularly language as difficult to understand as is contained in section 2(a) of the Robinson-Patman Act ["precision of expression is not an outstanding characteristic of the Robinson-Patman Act." *Automatic Canteen Co. v. F.T.C.*, 346 U.S. 61, 65 (1952)], is to tell the jury nothing. *Pfotzer v. Aqua Systems, Inc.*, 162 F.2d 779, 783 (2nd Cir. 1947), and to submit the evidence and theories of one party and not call the attention of the jury to the main points of the opposite party's case is reversible error. *Pullman Co. v. Hall*, 46 F.2d 399 (4th Cir. 1931).

In *Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212 (1947), the respondent had moved for a directed verdict in the trial court, and that motion was denied. A verdict was returned for the petitioner and judgment entered on the verdict. The respondent moved for a new trial on the ground of newly discovered evidence, and this motion was denied. Respondent did not move for a judgment notwithstanding the verdict, as it could have done under Rule 50(b). On appeal the Court of Appeals reversed the case and directed that judgment be entered for the respondent. This Court held that since the respondent had not made a motion in accordance with Rule 50(b), the appellate court could not direct the District Court to enter a contrary judgment but must remand the case for a new trial as respondent's motion for a directed verdict had been erroneously denied. The exact language of this Court was:

> The respondent failed to submit a motion for judgment notwithstanding the verdict to the trial judge in order that he might exercise his discretionary power to determine whether there should be such a judgment, a dismissal, or a new trial. In *the absence of such a motion*, we think the appellate court was without power to direct the District Court to enter judgment contrary to the one it had permitted to stand. *Id.*, 217-218 (Emphasis added).

Applying the precise holding in *Cone* to this case, since Carnation made the required motion under Rule 50(b), it is clear that the Court of Appeals had the power to direct entry of a contrary judgment. This Court so held in *Montgomey Ward v. Duncan*, 311 U.S. at 254 (1940) where it stated:

> If alternative prayers or motions are presented as here, we hold that the trial judge should rule on the motion for judgment. Whatever his ruling thereon he should also rule on the motion for a new trial, indi-

> cating the grounds of his decision. If he denies a judgment n.o.v. and also denies a new trial the judgment on the verdict stands and the losing party may appeal from the judgment entered upon it, assigning as error both the refusal of judgment n.o.v. and errors of law in the trial, as heretofore. *The appellate court may reverse the former action and itself enter judgment n.o.v.* or it may reverse and remand for a new trial for errors of law. (Emphasis supplied)

This Court emphasized, as a basis for its holding in *Cone*, that a motion under Rule 50(b)

> . . . presents to the trial judge an opportunity, after all his rulings have been made and all the evidence has been evaluated, to view the proceedings in a perspective peculiarly available to him alone. He is thus afforded a "last chance to correct his own errors without the delay, expense or other hardships of an appeal." 330 U.S. at 216.

In the case at bar, Carnation made the required motion for judgment n.o.v.; thus the trial judge *did* have a chance to correct his errors before the delay and expense of an appeal became involved. Here the rationale of *Cone* is satisfied, for the trial judge was given the first chance to decide if a new trial should be granted. *Cone* does not in any way suggest that *only* the trial judge should decide whether a new trial should be granted. It only holds that the appellate court cannot reverse and itself order entry of judgment *unless*, as here, the appellant followed its motion for a directed verdict with a motion for judgment n.o.v. under Rule 50(b).

In *Globe Liquor Co. v. San Roman*, 332 U.S. 571 (1948), this Court affirmed *Cone*, and supplemented the rule that the Court of Appeals was without power to order the entry of final judgment for the loser of a jury verdict where the loser did not make a timely motion as required by Rule 50(b),

by applying it to a case where the jury's verdict was directed. This decision was also put in terms of an exception to the rule that the Court of Appeals would normally have this power, the specific language being:

> But *since* the respondents made no motion for judgment under Rule 50(b), it was error to direct the District Court to enter a judgment in their favor. The case should go back to the District Court for a new trial. *Globe Liquor Co. v. San Roman*, 332 U.S. at 574 (Emphasis supplied)

We submit that *Weade v. Dichmann, Wright & Pugh*, 337 U.S. 801 (1949) does not really involve the construction of Rule 50(b). In that case the respondent did make an appropriate motion in the trial court under Rule 50(b) and the motion was denied. On appeal, the Court of Appeals reversed and instructed the trial court to enter judgment for the respondent. Subsequently this Court held that the appellate court was in error in directing entry of judgment for the respondent. It is most important to note, however, that there was no mention of lack of *power* in the appellate court so to direct once the motion under Rule 50(b) was made. Rather this Court indicated the Court of Appeals should not have directed entry of judgment *only* because there were suggestions in the complaint and evidence of an alternative ground for relief that had not been considered. No such suggestion appears in the case at bar as to Carnation. The citation of *Cone* and *Globe Liquor* for this Court's modification of the decision of the Court of Appeals in *Weade* clearly indicates that if this alternative ground had not been present, the Court of Appeals would have had power to direct entry of judgment for the respondents.

In summary, we respectfully submit that *Cone* and *Globe Liquor* do not change the general rule that a Court of Appeals

does have power to finally dispose of a case. The thrust of these holdings is merely to place a limitation upon this power, that limitation being that a motion under Rule 50(b) must be made before the power exists to reverse and direct entry of judgment for the appellant. The *Weade* corollary merely indicates that a Court of Appeals should not finally dispose of a case if there is a possibility of an alternative ground for relief, but otherwise, where an appropriate 50(b) motion has been made, the Court of Appeals does have power to direct reversal of judgment.

The compatibility of these decisions of this Court with the mandate of the Court of Appeals in the case at bar is thus demonstrated. The requirement of *Cone* and *Globe Liquor* for an appropriate Rule 50(b) motion and a ruling thereon by the trial court have been met. The motion for a judgment n.o.v. or for a new trial filed by Carnation afforded the trial court full opportunity to correct its own errors before the delay and expense of an appeal. Rather than exercising any "primary discretion"[1] the trial court summarily denied all of Carnation's motions before it. The failure to make the requisite motion for judgment n.o.v. to the trial court which this court found in *Cone, Globe Liquor* and *Fountain v. Filson* to result in prejudice to the losing party in the Court of Appeals is wholly wanting here. Utah Pie, represented by able and experienced counsel, deliberately chose to spurn the opportunity afforded by Rule 50(d) to suggest grounds to the Court of Appeals for a new trial if the judgment below against Carnation were to be reversed. No suggestion as in *Weade* appears in the evidence or pleadings that Utah Pie has any alternative ground for relief not fully considered by the

[1]See statement of Justices Black and Douglas in respect to the 1963 amendments in 9 L. ed. 2d lxv, 83 S. Ct. 43, 44.

Court of Appeals. Its judgment should be affirmed as to Carnation.

Petitioner in its brief to this Court attempts to bring its case within the *Weade* corollary, asserting that the Court of Appeals created a "hole" in its case by expressly eliminating from its consideration evidence as to prices and sales in Denver (Br., pp. 121-128; 135-137).

Whatever the merits of this contention, it applies to Utah Pie's claims against other respondents, not Carnation. No claim was made at the trial or in the Court of Appeals that Carnation in any way affected plaintiff's sales in Denver or that Denver was the situs of either Carnation's allegedly low or high legs. Petitioner's damage exhibits relating to the Denver market (Ex. 98, R. 4601; and Ex. 99, R. 4603) have no reference to Carnation, as counsel for Utah Pie conceded in his argument to the jury (R. 1276). The references to Denver in the argument of counsel for Carnation, carefully culled out of context in the quotations at page 124 of petitioner's brief, pertain solely to the conspiracy claim against Carnation, resolved against Utah Pie at the jury level. While the argument at pages 121 to 140 of its brief does not specify which respondent was involved in the claimed Denver "hole," this obfuscation is clarified in the summaries at pages 5 and 64 of its brief. Petitioner there refers expressly to its claim that Continental engaged in price discrimination in Denver and that Denver was part of Utah Pie's case only against Continental.

It must be concluded that Utah Pie can offer no suggestion to this Court as to why it should have a new trial against Carnation. The "hole" in its case as to Carnation — the failure of plaintiff to prove a violation of section 2(a) of the Robinson-Patman Act by Carnation — existed from the time plain-

tiff rested. That hole was brought to its attention by Carnation's motions for a directed verdict and by its motion for judgment n.o.v., as well as in its brief to the Court of Appeals. Petitioner admits in its brief that there was no evidence which it claims should have been admitted but was erroneously excluded by the trial court (Tr. 136). It offers no other reason why it should have a new trial of its section 2(a) claims against Carnation. On its own admissions, contained in its brief to this Court, Utah Pie has no basis for a new trial against Carnation. It would appear that as to Carnation, the writ was improvidently granted.

C. Question No. III. Whether Rule 50(d) of The Federal Rules of Civil Procedure Provides The Court of Appeals With Any Authority to Direct The Entry of Judgment For Respondents.

Implicit in the manner in which this question is framed is the suggestion that Rule 50(d) is the source of authority to the Court of Appeals to direct entry of judgment for respondents. As we have demonstrated above and as petitioner concedes in its brief (pp. 132, 137), such is not the case. This Court recognized in *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243 (1940), that a Court of Appeals may reverse and itself enter judgment n.o.v. *Cone* and *Globe Liquor* merely impose the condition precident that an appropriate 50(b) motion be made and ruled upon by the trial court.

Both *Baltimore and Carolina Line, Inc. v. Redman*, 295 U.S. 654 (1934) and the cases cited by petitioner at page 162 of its brief recognize this power of federal appellate courts. After this Court's decision in *Montgomery Ward, Cone* and *Globe Liquor*, all these decisions were codified in the 1948 judicial code. Section 2106 of Title 28 provides:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

In *Bryan v. United States*, 338 U.S. 552 (1950), this Court recognized that this statutory provision clarified the power of the Courts of Appeal, making it co-extensive with that of this Court to direct such appropriate judgment as may be just under the circumstances. It is submitted this statute is controlling and that there is nothing in Rule 50 or any decision of this Court limiting the power therein granted in the procedural posture here presented.

Prior to and since the adoption of section 2106 in 1948, both this Court and the Courts of Appeal have continued to direct entry of judgment for the verdict loser if the loser was erroneously denied a motion for judgment n.o.v. by the trial court. This Court held in *New York, New Haven and Hartford Railroad v. Henegan*, 364 U.S. 441, 442 (1961) in an action under the Federal Employers' Liability Act that where evidence was insufficient to submit the question of employer negligence to the jury, the judgment should be reversed and "the cause remanded to the District Court with direction to enter judgment for the petitioner [defendant below] notwithstanding the verdict." Similarly, the Third Circuit in dictum in *Garman v. Metropolitan Life Insurance Co.*, 175 F. 2d 24, 28 (3rd Cir. 1949) and again in *Woods v. National Life and Accident Insurance Company*, 347 F. 2d 760 (3rd Cir. 1965) has indicated that but for the fact that the defendant failed to make a motion in accordance with Rule 50(b) (a motion

for judgment n.o.v.) it would have the power to direct entry of judgment for the appellant. The Fourth Circuit, in *Home Life Ins. Co, of New York v. Moon*, 110 F.2d 184 (4th Cir. 1940) early decided that where the evidence justified only one reasonable inference, the court could and did remand with directions to set aside the judgment on the verdict and enter judgment for the defendant-appellant. This Court denied certiorari, 311 U.S. 659. The Fifth Circuit cited *Cone v. West Virginia Pulp & Paper Co.* in reversing and directing entry of judgment in accordance with appellant's motion for judgment n.o.v. in *Mass. Mutual Life Ins. Co. v. Smith*, 193 F.2d 511, 513 (5th Cir. 1951), *cert. den.* 344 U.S. 823 (1952); and after adoption of Rule 50(c) (2) and 50(d) it continued following this procedure. In *Southern Pac. Co. v. Mathews*, 335 F.2d 924 (5th Cir. 1964), *cert. den.* 379 U.S. 970, it reversed and remanded for entry of judgment n.o.v. where a local statute established contributory negligence as a matter of law, and thus there was no proper jury issue in a negligence action. The Seventh Circuit also directed a judgment for an appellant verdict loser in *Kaminski v. Chicago River & Indiana R. Co.*, 200 F.2d 1 (7th Cir. 1952) where appellant had moved for a judgment n.o.v. in the trial court. Cf., *Quinby v. Morrow*, 340 F.2d 884 (2nd Cir. 1965); *Lloyd's of London v. Cordova Airlines, Inc.*, 283 F.2d 659, 665 (9th Cir. 1960); *Yorkshire Indemnity Co. v. Roosth & Genecov Pro. Co.* 252 F.2d 650, 657 (5th Cir. 1958); *General American Life Ins. Co. v. Central Nat'l Bank*, 136 F.2d 821, 822 (6th Cir. 1943).

Rule 50(d), as the Advisory Committee noted with respect to the entire rule, does "not alter the effect of a jury verdict or the scope of appellate review." 5 MOORE'S FEDERAL PRACTICE § 50.02 at 150 (1965 Supp.) The second sentence of the rule reads:

> If the appellate court reverses the judgment, *nothing in this rule precludes* it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted. (Emphasis added)

This language is in no way mandatory or limiting, but is permissive and enabling. It merely states the appellate court is in no way precluded from ordering a new trial or remanding to the trial court for such determination. As petitioner recognizes in its brief (p. 137), there is nothing in the language of the rule to restrict an appellate court from exercising the power long recognized in the decisions of this Court and codified in section 2106 of the Judicial Code to reverse and order judgment to be entered in accordance with the court's opinion.

The Court of Appeals has the power, as this Court has long recognized, to correct error, not merely by reversing for a new trial but by ordering judgment for the other party notwithstanding the verdict. As Professor Kaplan noted in "Amendments to the Federal Rules of Civil Procedure, 1961-1963 (II)," 77 Harv. L. Rev. 801 at 814:

> The power to modify the verdict by ordering a contrary judgment should no doubt be exercised circumspectly, with proper safeguards for the party who won the verdict; but to deprive the appellate court of this power altogether is to compel it to order some useless retrials.

It is submitted such is the case at bar.

II. THE COURT OF APPEALS PROPERLY HELD THE EVIDENCE INSUFFICIENT TO SUPPORT THE JURY VERDICT AGAINST CARNATION.

22; R. 241, 2167, 2170, 2171, 2174) treat all deals as a cost of sale and lump them indiscriminately in a section captioned "Deal Cost Per Case." With insignificant exceptions, Carnation's *list* prices were always identical in the Seattle, Portland, Spokane, Salt Lake City and Denver markets (Pl. Ex. 65; R. 454, 2368-2401) and they were frequently identical in San Francisco and Salt Lake City (Pl. Exs. 64, 65; R. 454, 2331-2401); it was the deals, of *all* types, which enabled Carnation to "remain competitive." (Exs. C-B, C-C, C-E, C-F; R. 470, 5722-5735, 5748-5766). Minutes of Carnation's Frozen Foods Committee consistently treated advertising and off-the-face allowances as equivalents, and frequently refered generally to "deals" without specifying variety (Pl. Exs. 67-74; R. 458, 2509-2528). On at least two occasions, the minutes reveal, Carnation increased amounts of existing advertising allowances "due to a competitive situation" (R. 2515, 2518).[1]

Concededly, advertising allowances were paid only on proof of performance. But the required performance was nominal and the amount of the rebate was substantial. In the years in question, Carnation offered San Francisco wholesalers as much as $1,725.00 per truckload on apple pies and $1,800.00 per truckload (the largest discount offered in either market at any time) on pumpkin pies (Ex. C-E; R. 470, 5748, 5754, 5757). Ads could be of any size; a one-day, one-line ad would qualify for rebates on all pies purchased the week of the ad (R. 461-462; Ex. C-E; R. 470, 5748). In practice, the grocers simply inserted a reference to frozen pies in their regular weekly ad, at no additional expenditure (R. 716-717). For these efforts they were reimbursed by Carnation's *cooperative* advertising payments, which were offered in *all* markets in

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[1]Additional sections of the frozen food minutes, offered into evidence by Carnation, were rejected by the trial court (R. 457-458, 1195-1196).

substantially identical amounts (Exs. C-B, C-C, C-D, C-E, C-F; R. 470, 5722, 5729, 5736, 5748, 5760). Any additional payment by way of an advertising *allowance* was in effect a straight price reduction (R. 716).[1]

Utah Pie's argument is nothing more than a play on the words "not a price cut." It ignores the marketing facts which brought advertising allowances into being and the purposes for which Carnation's advertising allowances were used. It ignores the great fluctuations in the amounts of Carnation advertising allowances in a given market, both from time to time on the same flavor and on different flavors at the same time, which can only be explained as price concessions (see, e.g., Ex. C-E; R. 470, 5748-5757). It ignores the fact that petitioner itself substituted a small 10c advertising allowance for a straight 10c price cut, simultaneously selling to one large chain, Albertson's Markets, at $3.50 per dozen, while selling other major buyers (Safeway, Utah Wholesale Frozen Foods and others) at $3.60 per dozen less a 10c advertising allowance (Pl. Ex. 4; R. 67, 1530, 1555-1557). (When Albertson's price was later reduced to $3.40, the price to Safeway and others was reduced to $3.50 less the advertising allowance. R. 1556-1557).

Utah Pie's argument ignores the fact that off-the-face allowances were designed to, and did, secure advertising (R. 696, 713; Pl. Ex. 129; R. 1224, 5348, 5349, 5356). And it postulates, against all the evidence of record, that Carnation could successfully sell pies against "County Fair, Johnson, Morton, Pet Ritz, Frigid Dough, Banquet, plus many others" in the San Francisco market at its high, rigid *list* prices which, on

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[1]See *Fred Meyer, Inc. v. FTC*, 359 F.2d 351 (9th Cir. 1966) holding that where substantial disparities exist between allowances and allocable expenses, these excesses are "outright price concessions cognizable under section 2(a)." 359 F.2d at 362.

apple pie for example, were changed only once (increased) after January, 1959 (R. 1190; Pl. Ex. 64; R. 454, 2331, 2344-2366).

Counsel for petitioner was himself not oblivious to the nature of advertising allowances at the trial. His "sales below cost" exhibit (Pl. Ex. 26; R. 248, 2180) deducted all Carnation deals, *including advertising allowances*, in computing Carnation's cost. He spent pages of testimony trying to impeach a chart of Salt Lake City prices because, he claimed, the advertising allowances had *not* been deducted (R. 1094-1097).

Elsewhere, he argued:

> Q. [By Mr. Alioto] Now . . . I take it, Mr. Murphy, that a "deal" means that it is a *price reduction* of some kind by virtue of an allowance, an advertising allowance, or a straight price reduction, is that it?
>
> . . . .
>
> Q. In any event, when it says "deal," and it gives a figure, that means a figure *below* some other price, isn't that correct?
>
> A. That's correct. [R. 459; compare R. 458, 1237.]

There is no dispute in the record that the difference between "advertising" and "off-invoice" deals is simply one of procedure. The former is paid after invoicing—the latter is deducted from the invoice. Each lowers the prices paid by wholesalers, and ultimately, by consumers; and each secures advertising.

By any index (compare Table XII, *infra*; Ex. C-H; R. 1001, 5768), the differences between Carnation's San Francisco and Salt Lake City *net* prices were simply the variable

result of differing competitive conditions in wholly unrelated markets.

The language of the court in *Balian Ice Cream Co. v. Arden Farms Co.*, 231 F.2d 356, 367 (9th Cir. 1955) *cert. den.* 350 U.S. 991 (1956) is equally applicable here:

> [Carnation] was doing business in a number of largely disconnected, homogeneous, competitive areas. There simply was no reason for uniformity of price throughout these areas.

Carnation's lowest apple pie price in Salt Lake City was higher than its lowest price in San Francisco in twenty-six months, lower in eleven months, and the same in seven months, of the period covered by this lawsuit. *There was no pattern of price differences in one market over another.*

TABLE XII

Comparison of Lowest Net Prices of One Dozen Simple Simon Apple Pies, Salt Lake City and San Francisco Markets, 1958-1961

(Sources: Pl. Exs. 64, 65; R. 454, 2331-2401; Exs. C-E, C-F; R. 470, 5748-5766.)

(SL—Salt Lake City; SF—San Francisco)

	1958		1959		1960		1961	
	SL	SF	SL	SF	SL	SF	SL	SF
January	4.66	4.66	4.22	3.90	3.90	3.60	3.46	4.01
February	4.82	4.82	4.22	3.90	3.00	3.60	3.46	3.91
March	4.82	4.82	4.22	3.90	3.00	3.24	3.46	3.81
April	4.82	4.58	4.22	3.90	3.48	3.48	3.46	3.81
May	4.82	4.38	4.22	3.90	3.48	3.60	3.46	3.81
June	4.82	4.38	4.22	3.90	3.48	3.42	3.46	3.81
July	4.82	4.34	3.90	3.90	3.71	3.47	3.46	3.71
August	4.82	4.22	3.90	3.90	3.95	3.91	3.46	3.16
September	4.82	4.22	3.90	3.90	3.95	3.91		
October	4.82*	4.90	3.90	3.90	3.95	3.81		
November	4.82*	3.78	3.70	3.90	3.91	3.81		
December	4.82*	3.78	3.70	3.40	3.91	3.81		

*See R. 1166

In *FTC v. Borden Co.*, 383 U.S. 637 (1966), this Court recently repudiated the notion that a "price differential" must be equated "in all circumstances" with "price discrimination," and stated that the critical determination is "*whether the differential under attack is discriminatory within the meaning of the act*, whether competition may be injured, and whether the differential is cost justified or is defensible as a good faith effort to meet the price of a competitor." (*Id.* at 159)

Only occasionally, in the nearly four years covered by this suit, were lower prices available to buyers in Northern California than in the Utah area (Table XII, *supra;* Ex. C-H; R. 1001, 5768). The context of these sporadic price differences refutes the notion that Carnation discriminated in price in favor of either group or against either area. For this additional reason, the nature, type and duration of differences in price between different and unrelated markets in the context of this case are not price discriminations within the meaning of the Act. *FTC v. Borden Co., supra.*

Petitioner also argues (Br. 86-87) that the Court of Appeals should not have considered advertising allowances in determining net or absolute prices to a buyer in a particular market for section 2(a) purposes because, petitioner asserts, advertising allowances are governed by section 2(d) of the Robinson-Patman Act. But this Court recognized in *FTC v. Henry Broch & Co.*, 363 U.S. 163, 170 (1960) that the various subsections of the act are not mutually exclusive and "the fact that a transaction does not violate one section of the Act does not answer the question of whether another section has been violated." While advertising allowances might be pertinent to a section 2(d) inquiry if not, as here, granted to all buyers in a particular market, that does not mean that the effect of advertising allowances in reducing the amount the buyer pays is not an appropriate inquiry in a

section 2(a) case where the test is price differences and their effect. Deals, whether in the form of merchandising allowances, advertising allowances or off-the-face, had the same economic effect and competitive purpose — "to induce the retailer to purchase and advertise Carnation pies and thereby meet the competitive tactics of other manufacturers having a like aim." (R. 1485). Compare *Fred Meyer, Inc. v. FTC*, 359 F.2d 351 (9th Cir. 1966).

Petitioner's stratagem that it could demonstrate Carnation had higher prices in San Francisco than in Salt Lake, if one only compared list prices in the former, without deducting advertising allowance deals, with net prices in the latter, after deducting off-invoice deals employed in the Salt Lake market, was used for the first time in the Court of Appeals. This ploy did not deceive that court (R. 1485). It deserves no better consideration here.

B. Carnation's Temporary Price Differences Were Not Reasonably Likely to Substantially Lessen Competition or Tend To Create a Monopoly.

The use of different prices in different markets for pies—as well as beer and ice cream—is in itself a proper method of competition. *Anheuser-Busch, Inc. v. FTC*, 289 F.2d 835 (7th Cir. 1961); *Balian Ice Cream Co. v. Arden Farms Co., supra.* The question in the case at bar is not the effect of price reductions in only *one* market directed toward a particular competitor[1]—but, the effect of different deals offered in

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[1] *Atlas Building Products Co. v. Diamond Block & Gravel Co.*, 269 F.2d 950 (10th Cir., 1959), *cert. denied* 363 U.S. 843 (1960); *E. B. Muller & Co. v. FTC*, 142 F.2d 511 (6th Cir. 1944); *Moore v. Mead's Fine Bread Co.*, 348 U.S. 115 (1954); *Maryland Baking Co. v. FTC* 243 F.2d 716 (4th Cir. 1957); *Porto Rican American Tobacco Co. v. American Tobacco Co.*, 30 F.2d 234 (2d Cir. 1929), *cert denied*, 279 U.S. 858 (1929).

different markets, depending on the competitive conditions in those markets. Thus, there is eliminated here the issue of predatory pricing or "buccaneering." Here, Carnation was only struggling to keep its foot in the door against competition, not only of the plaintiff, but of Pet Ritz, Bel-air, Morton, Banquet, Libby and numerous other sellers in the Utah market.

As was noted by the Seventh Circuit in *Anheuser-Busch, Inc. v. FTC, supra,* at 840:

> The Act is really referring to the effect upon competition and not merely upon competitors. In this respect §2(a) must be read in conformity with the public policy of preserving competition but it is not concerned with mere shifts of business between competitors. It is concerned with substantial impairment of the vigor or health of the contest for business, regardless of which competitor wins or loses. The competition which is sought to be protected by this section is a contest between sellers for the buyer's business, because, "competition is, in its very essence, a contest for trade" . . . "Competition . . . is a battle for something that only one can get; one competitor must necessarily lose." Sinclair Refining Co. v. Federal Trade Commission, 7 Cir. 1921, 276 Fed. 686, 688, affirmed 261 U.S. 463, 43 S. Ct. 450, 67 L.ed. 746. "Antitrust legislation is concerned primarily with the health of the competitive process, not with the individual competitor who must sink or swim in competitive enterprise. . . ."

The oft-cited Frederick M. Rowe, at pages 160 and 161 of his definitive work, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT (1962), suggests the indicia which appear in the cases to dispel the existence of adverse competitive effects attributable to a seller's pricing. These indicia have a particular pertinence to the case at bar, for the evidence as applied to each indicium clearly dispels the ex-

istence of any adverse competitive effect attributable to Carnation's pricing practices. A brief review demonstrates this fact clearly.

1. *Decline in the seller's own percentage share of the market, notwithstanding his price differentials.*

In *Minneapolis-Honeywell Regulator Co. v, FTC*, 191 F.2d 786 (7th Cir. 1951), *petition for cert. dismissed* 344 U.S. 206 (1952), the petitioner's percentage of the market declined from 78 per cent to 60 per cent, or about 17 per cent. In the case at bar, Carnation's market share declined from 10.3 per cent in 1958 to 8.8 per cent in 1961, and in 1962 Carnation's volume plummeted to a level lower than any of the preceding five years (Pl. Ex. 62; R. 437, 2323-2326; Ex. C-O; R. 1163, 5775-5776). The only threat to competition involving Carnation would appear to be that Carnation itself might be eliminated from the Salt Lake market.

2. *Minor over-all market position of the seller.*

In *Anheuser-Busch, Inc. v. FTC*, 289 F.2d 835 (7th Cir. 1961), the court pointed out that Anheuser-Busch's gains were only temporary, its leading competitor actually increased its share, and in Anheuser-Busch's best year its share was not as great as the shares of leading competitors before and after the price reduction. Among the four parties to this action, Carnation's market share was a poor third during the entire period, actually losing volume as well as market share in 1961 (*Ibid.*) Carnation's market share in its best year (1960) was only 12 per cent, while Anheuser-Busch increased from 12.5 to 39.7 before returning to 17.5 in the St. Louis beer price war. In *Anheuser-Busch* the court noted, at page 839, that the defendant's competitors controlled "more than three-fourths of market sales." In the case at bar Carnation's competitors

always controlled from 89.7 per cent to 91.4 per cent of the market, and the plaintiff itself in its worst year (1959) held a market share three times as great as Carnation held in its best year (1960) (*Ibid.*)

3. *Growth of the seller's competitors in terms of their market share, their absolute sales volume, or simply by their sales to full capacity.*

Sales of Carnation's competitors quadrupled from 51,000 dozen in 1958 to 206,000 dozen in 1961 and their market shares increased from 89.7 per cent to 91.2 per cent (*Ibid.*). A comparison of Utah Pie's and Carnation's volumes shows Utah Pie's growth even more dramatically. In apple pie, the leader in volume and the price indicator, Utah Pie's volume increased from four and one-half times Carnation's volume in 1958 to seven times Carnation's volume in 1961. Utah Pie showed a substantial increase in every year while Carnation's volume declined in 1961. The total market for apple pies increased each year from 1958's 17,000 dozen to almost 180,000 dozen in 1961 (*Ibid.*). This phenomenal growth of Carnation's competition entirely negates the competitive injury alleged.

4. *Prevalence of comparable price variations on the part of competitors.*

The most graphic evidence of comparable price variations on the part of Carnation's competitors is the charts introduced as Exs. M-17, M-18, and M-19 (R. 609, 611, 614; original exhibits on file with Clerk of this Court), which show that in 1961 Utah brand had five price changes: Frost 'N Flame, three; Pet Ritz, five; Bel-air, two; Swiss Miss, six; Morton, fourteen; and Simple Simon, five. In 1959, 1960 and 1961, all the competitors engaged in various price cuts, all but Carnation introduced new, lower priced brands such as Frost 'N Flame,

Swiss Miss and Bel-air, and Morton reduced the weight of its pie.

These price changes and aggressive marketing tactics of competition signify a continued healthy competitive battle in the Salt Lake frozen pie market.

5. *Inroads by sellers on each other's customers and/or customer switches among sellers.*

The record shows that shifts in customers were directly related to changes in price and to the introduction of new, low-priced private brands and light-weight labels (R. 1100-1104). For example, during 1959, Safeway began purchasing the Bel-air private label from Pet and Utah Pie's sales to this customer were nearly halved, while Carnation by 1961 was pushed out of the account altogether (Pl. Ex. 62; R. 437, 2323, 2324; Ex. C-R; R. 1165, 5821). Utah Pie countered by offering to produce the Bel-air label and in 1960 succeeded in replacing Pet as Safeway's principal supplier on pumpkin and mince pies (Exs. M-71, M-72; R. 843, 5565-5567; Pl. Ex. 62; R. 437, 2325; Pl. Ex 4; R. 67, 1530, 1630-1649). Then in June of 1961, Morton succeeded in getting two orders from Safeway on apple pie (R. 203) and again Pet lost position temporarily with this account (Pl. Ex. 62; R. 437, 2323, 2325-2326). Similarly, at Associated Frozen Foods, Utah Pie's sales increased by more than 300 per cent—five times the rate of the total market—when in 1960 it introduced its controlled label Frost 'N Flame exclusively wtih Associated Frozen Foods (*Id.* at 2324-2325; Ex. C-R; R. 1165, 5821). In 1961, its private Mayfresh label introduced at American Food Stores succeeded in replacing Morton as American's principal supplier (R. 220). At Utah Wholesale, the buying agent for American Food Stores (Pl. Ex. 4; R. 67, 1530, e.g., 1559-1562), Carnation's 1961 volume dropped one-third below its 1960 sales, while

Utah Pie Company's sales to Utah Wholesale were about one-third greater than they were in 1960 (Ex. C-R; R. 1165, 5821).

These switches among competitors indicate a healthy competitive battle for the business of the major buyers among all the sellers, a battle in which Carnation, not Utah Pie, was the loser.

6. *Ease of entry by competing sellers into the pertinent market.*

Utah Pie's experience alone is proof of ease of entry. Even though it had entered the frozen pie business only late in 1957, petitioner commanded 67 per cent of the buisness in 1958 (R. 524; Pl. Ex. 62; R. 437, 2323). The number of sellers and brands in the market increased from seven sellers and seven brands in 1960, to eight sellers and thirteen brands in 1961 (R. 1104); and the volume of sellers not parties to this litigation grew from 3,100 dozen in 1958 to 18,600 dozen in 1961 (Pl. Ex. 62; R. 437, 2323-2326). Altogether, some nineteen different brands were advertised in the Salt Lake market from 1958 to 1961, all of which provided Carnation with vigorous competition, real as well as potential, throughout the entire period (Ex. A-27; R. 893, 5824).

7. *Keenness of competition among the sellers, or overall dynamism in the market.*

In *Balian Ice Cream Co. v. Arden Farms Co.*, 231 F.2d 356 (9th Cir. 1955), the appellate court stated (p. 368) that the plaintiff's complained loss of revenue was "attributable solely to the intensively competitive Los Angeles ice cream market for which plaintiff is partly responsible." In *Anheuser-Busch, Inc. v. FTC*, 289 F.2d 835 (7th Cir. 1961), the court noted, in support of its finding of no injury to competition, that during Anheuser-Busch's price-cutting period its competi-

tors increased their competitive activity by changing grades and labels and by advertising special price promotions.

These comments aptly describe the Salt Lake market during the period in question. We have already noted the changing of weights and brands of pies and the price promotions, for all of which petitioner's competitive tactics were partly responsible.

A look at the relative standing of apple pie sellers shows how keen was the competition. In 1958, Utah was first, Pet Ritz second and Carnation third. In 1959, Utah was first, Bel-air second, Pet Ritz third, and Carnation fourth. In 1960, Utah Pie's Frost 'N Flame brand was first and its Utah brand third, while Bel-air was second and Carnation fourth. In 1961, Frost 'N Flame and Utah brands were first and second, Swiss Miss third, Morton fourth, Bel-air fifth and Carnation dropped to sixth (Pl. Ex. 62; R. 437, 2523-2526).

8. *Competition by seller against strongly entrenched regional competitors.*

Utah Pie's well-known name, its ability to make small shipments in an industry requiring expensive freezer storage, and to make those shipments rapidly, gave Utah Pie a natural advantage in the market (R. 202, 694-695, 712-714, 878). Not satisfied with this margin, Utah Pie entered the market well below the prevailing price level and maintained this spread consistently throughout the four-year period in controversy (see Tables II, IV, VI and VIII, *supra*). The impact of Utah Pie's price cutting upon Carnation has been tremendous. Carnation's sales in Salt Lake City proper were cut from 9,300 dozen in 1957 to 5,700 dozen in 1958 and from that time Utah Pie's market share was from four to six times that of Carnation (Ex. C-O; R. 1163, 5775; Pl. Ex. 62; R. 437, 2523-2526).

In *Purex Corp. Ltd.*, 51 F.T.C. 100 (1954), a geographical price discrimination case, an attack was made on a deal program similar to that practiced by Carnation. The evidence showed that despite the geographical differences created by a program of having different deals of short term duration in the various market areas, the sales of the dominant local competitor of the Purex Corp. increased. The Trade Commission noted:

> The main complaint voiced with respect to it appears that it was not permitted to expand at a rate which would have established it as a virtual monopoly in this area. This is hardly a basis upon which to base a finding of injury to competition (at 142).

Utah Pie's complaint here, evidenced clearly by its damage exhibit, is that it did not retain the virtual monopoly of the Salt Lake market it captured in its price-cutting inaugural year.

9. *Aim by seller to improve his deteriorating market position or temporary experimentation to this end.*

Carnation's volume in Salt Lake City proper dropped from 9,286 dozen in 1957 to 5,699 in 1958, and its share of the active market declined from 10.3 per cent in 1958 to 8.6 per cent in 1959. Carnation's market share for apple pie in 1959 was about one-half its share in 1958 (Ex. C-R; R. 1165, 5821; Pl. Ex. 62; R. 487, 2323-2326) A similar deteriorating position faced the Anheuser-Busch Company in *Anheuser-Busch, Inc. v. FTC, supra,* and the Arden Farms Company in *Balian Ice Cream, supra.*

In that context, the only Carnation deal in the Salt Lake City market that brought Carnation's price below that of plaintiff's brands was offered in February and March, 1960 (R. 1174-1175; Ex. C-F; R. 470, 5760, 5761; see Tables I, III, V and VII, *supra*).

This three-week special, offered in order to halt the trend of decreasing market shares and diminished sales, clearly could not have injured competition. As stated recently by the Seventh Circuit, the injury to competition required by the statute is "something more than an essentially temporary minimal impact." *American Oil Co. v. FTC*, 325 F.2d 101 (7th Cir. 1963), *cert. denied* 377 U.S. 954. See also *Whitaker Cable Corp. v. FTC*, 239 F.2d 253 (7th Cir. 1956), *cert. denied*, 353 U.S. 938 (1957); *General Foods Corp.*, 50 F.T.C. 885 (1954).

In summary, the significant point of the foregoing analysis of Mr. Rowe's criteria is that every one of the indicia demonstrates that any geographical price differences of Carnation could not have had the adverse competitive effect required by section 2(a) to make such price differences unlawful.

In addition, Utah Pie enjoyed increased sales and substantial profits in every year. In 1961, its net income was 14.4 per cent of its average net worth, after nearly trebling the bonuses paid the owners. While losing money in 1958, when it captured two-thirds of the market, Utah Pie by 1961 had more than doubled its net worth over its book value at the end of its 1957 fiscal year, when it entered the frozen pie field (Ex. A-46; R. 997, 5847-5855). Its impending demise is highly exaggerated.

C. Carnation Did Not Injure, But Was Injured By, Utah Pie.

In addition to its failure to submit sufficient evidence from which a jury might find the requisite probability of injury to competition by Carnation, petitioner failed to meet its burden of proof either that it was damaged in any respect or that such damage, if any, was proximately caused by any violation of section 2(a) by Carnation.

As this Court has noted, petitioner was required to prove the fact of damage with reasonable certainty, not by guess and conjecture. *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946); *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555 (1931).

> . . . [R]ecovery cannot be had unless it is shown that, as a result of defendant's acts, damages in some amount susceptible of expression in figures resulted. These damages must be proved by facts from which their existence is logically and legally inferable. They cannot be supplied by conjecture . . . *Keogh v. Chicago & N.W.R. Co*, 260 U.S. 156, 165 (1922).

Despite an increase in net income from a loss of more than $5,400.00 in 1957 to a profit exceeding $19,000.00 in 1961, accompanied by substantial increases in the salaries and bonuses paid the Rigby family themselves (Ex. A-46; R. 997, 5847-5855), Utah Pie in the court below claimed an additional $741,000 in lost profits over the four-year period covered by the complaint, $98,000 of which was charged to Carnation (Pl. Ex. 95; R. 574, 4591). As against Carnation Utah Pie claimed losses from reduced selling prices, reduced market share, and a diminution of its good will (*Ibid*) — but it failed to support these assertions with a shred of evidence linking its alleged losses in any way to any activity of Carnation — licit or illicit.

1. *Reduced selling prices.*

Petitioner's voluminous damage exhibits 95 through 101 (R. 4591-4606) were not offered as proof of the *fact* of damage, but only as arithmetic computations of the *extent* of damage based upon testimony elsewhere in the record (R. 588-589).

The record gives no support to the assumption that Carnation had anything to do with Utah Pie's price decline. Gay-

len Rigby identified "competitive action" as the cause (R. 551-552), but could not recall the competitor responsible for each of Utah Pie's price cuts, the price of that competitor, or the prices of other competitors (R. 792-793). The opinion of Elmer Degenhardt, cited at pages 55 56 of petitioner's brief, fails to name Carnation as the cause of any Utah Pie price cut, and states the obvious conclusion that if all the sellers (including the non-party sellers) had maintained prices at their 1957 levels (Carnation's 1957 level for apple pie was from $4.66 to $4.90 per dozen, Pl. Ex. 65; R. 454, 2368-2370), Utah Pie would not have lowered its prices below $3.70 (R. 725).

Table XIII

Prices charged in Salt Lake City for One Dozen Apple Pies on Dates of Major Utah Pie Price Cuts

(Sources: Pl. Ex. 4; R. 67, 1580; Ex. C-Q; R. 1164, 5779)

Date of Major Utah Brand Price Cut	Simple Simon Price	Frost 'N Flame Price	Old Utah Brand Price	New Utah Brand Price
4-14-1958	5.06	-----	4.30	4.00
8-10-1959	4.18	-----	3.90	3.60
6-23-1961	3.74	3.10	3.40	2.75
12-1-1961	3.88	3.10	3.40	2.90

And as the following table makes plain, there was no nexus between Carnation's prices in the Los Angeles or San Francisco markets and Utah Pie's price cuts.

TABLE XIV

Prices for One Dozen Simple Simon Apple Pies in Salt Lake City, Los Angeles, and San Francisco on Dates of Utah Pie Price Cuts

(Sources: Pl. Exs. 64, 65; R. 454, 2331, 2368; Exs. C-D, C-E, C-F; R. 470, 5736, 5748, 5760)

Date of Utah Brand Price Change	Carnation's Price* in: S.L.	L.A.	S.F.
4-14-1958	5.06	4.82	4.82
8-10-1959	4.18	4.18	4.18
6-23-1961	3.74	3.44	4.09
12-1-1961	3.88	3.88	3.49

*All prices are ex-warehouse quantity.

The record removes all doubt as to the real causes of petitioner's price cuts. Unless petitioner had concluded that increasing the spread between its own prices and the market would increase its sales, its 1958 price cut was simply not necessary, as none of the respondents was priced close to Utah Pie (Ex. M-19; R. 614, original exhibit on file with Clerk of this Court; Ex. A-38; R. 1100, 5845).

Obviously, Utah Pie may not recover for its own errors in judgment. *American Can Co. v. Russelville Canning Co.*, 191 F.2d 38 (8th Cir. 1951); *Miller Motors, Inc. v. Ford Motor Co.*, 252 F.2d 441 (4th Cir. 1958); *Atlas Building Products Co. v. Diamond Block & Gravel Co., supra* p. 57.

Utah Pie's drop in 1959 to $3.60 was clearly to beat Bel-air, which had cut its $3.98 price to $3.70 in July (Ex. A-35; R. 1065, 5827, 5844; Pl. Ex. 4; R. 67, 1530, 1543). Bel-air was advertised at retail at three for a dollar the week of July

30th, and Utah brand, after its August, 1959 price cut, was advertised at 3/$1.00 and 3 for 99c. Simple Simon, by contrast, was advertised during August at 49c per pie (Ex. M-56; R. 893, 5539, 5542). The evidence is overwhelming, and Gaylen Rigby himself admitted, that Utah Pie's June, 1961 price slashes were related to the competitive maneuvering of Morton and Utah Pie for the business of the major buyers, not to any price differential by Carnatiion (R. 827-828; compare Ex. M-19; R. 614, original exhibit on file with Clerk of this Court). Utah Pie's price cut to $2.75 on both of its major brands followed shortly after the Morton announced price of $2.85 per dozen delivered in Salt Lake City or $2.55 f.o.b. its plant in Watsonville, California (*Ibid.*); and Utah Pie's retail ads of four for a dollar on both brands beginning the week of June 29 followed close on the heels of Swiss Miss ads of three for 89c and 29c per pie, and were themselves followed by Morton ads of four for a dollar (Ex. M-56; R. 893, 5539, 5552-5553). Exhibits M-19 and M-56 similarly demonstrate that Utah Pie's return to $2.90 in December, 1961 was an attempt to beat a price offered by a competitor other than Carnation.

On this record the Court of Appeals properly held the evidence insufficient to support a finding that Carnation had caused a reduction in Utah Pie's prices. *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555 (1931); *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946).

2. *Reduced market share.*

Petitioner's claimed loss of market share was premised on the idea that but for the activities of Carnation *and* the other respondents Utah Pie would have retained in perpetuity the 66.5 per cent market share it captured in 1958, its price-cutting inaugural year (Pl. Ex. 94; R. 562-568, 4590). Unlike

Bigelow v. RKO Radio Pictures, supra, this was not a comparison of pre-violation and post-violation market shares, but a comparison of Utah Pie's market share in the first year of Carnation's alleged violations with its market shares in the later years. Since Utah Pie produced no evidence that Carnation's price-cutting activities changed after 1958, the selection of 1958 as a base year finds no support in the record.

Moreover, 1958 was the first full year Utah Pie was in business. The assumption that under normal marketing conditions a new business in a new, highly competitive industry would be expected to retain indefinitely the lion's share it captured in its initial year, and that any diminution of its market share in later years therefore constitutes lost profits attributable to unfair competition by Carnation or any other respondent, is pure conjecture.

Even if Utah Pie were entitled to retain its initial market share in perpetuity, its lost share did not shift to Carnation, as Table X, *supra,* makes clear. As that table demonstrates, Utah Pie and Carnation both dropped in 1959 with Pet and the All Other category showing increased market shares; Utah Pie and Carnation both showed gains in 1960; but by 1961 Carnation had less than in 1958, while Utah Pie, Pet and All Other sellers had held their 1960 gains.

The table shown on page 56 of petitioner's brief (and originally the basis of Utah Pie's damage exhibits, Pl. Exs. 94-101; R. 562-586, 4590-4606) gerrymanders the market to show an entirely misleading picture. It doctors the percentage shares, first, by eliminating the figures for All Other sellers in the market (R. 574, 578). This is no small item. In 1958, the All Other sellers constituted 5.5 per cent of the market; in 1959, 18.9 per cent; in 1960, 12.8 per cent; and in 1961, 8.1 per cent (Pl. Ex. 62; R. 437, 2823-2826). This little gambit

increased Utah Pie's base year percentage from 67 per cent to 70 per cent and particularly distorted the market shares for 1959 when the All Other sellers captured 18.9 per cent of the market. The effect on the figures for Carnation in 1959 is startling. When the other sellers' figures are included, Carnation's market share dropped from 9.7 per cent in 1958 to 8.1 per cent in 1959. Yet petitioner's doctored figures in Exhibits 95 and 96 charge Carnation in 1959 with capturing 3,108 dozen more than its "share" (R. 4591-4592). In fact, Carnation would have had to sell 1,279 dozen[1] more in 1959 than it actually did sell in order to retain the market position it had in 1958.

In addition, although private and controlled label pies (which were not introduced to the market until 1959) accounted for 23.1 per cent of the market in 1959, 38.5 per cent in 1960, and 31.9 per cent in 1961 (Pl. Ex. 62; R. 437, 2323-2326), the figures for these sales are also eliminated from the table on page 56 of petitioner's brief and in the damage exhibits (R. 574, 578). Since private and controlled labels constituted more than half of Utah Pie's business and none of Carnation's (Pl. Ex. 62; R. 437, 2323-2326), the elimination of these labels substantially distorted the figures for their respective shares. For example, Carnation would have had to sell 3,604 dozen more pies in 1961 than it actually sold to retain its 1958 market share position. Yet Exhibit 96 (R. 4592) would claim that Carnation owes Utah Pie 3,549 dozen for only the first eight months of that year! For 1960, the exhibit would charge Carnation with diverting 15,490 dozen; but when the other sellers and private label brands are included,

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[1]Computed from Pl. Ex. 62, excluding "other fruit" flavors. Actually, the figure would be slightly larger, since the Anderson study sampled slightly less than 100 per cent of the market (R. 1059-1060).

Utah Pie's share in 1960 grew by 13 per cent of the total market, while Carnation's grew by only 3 per cent.

Petitioner conceded at this trial that its private and controlled label pies (Frost 'N Flame, Sonny Boy, Mayfresh) were the same pie as its Utah brand, with "just a different name, different color" label (R. 554). This Court has only recently held that different labels do not differentiate products for the purpose of determining grade or quality under the Robinson-Patman Act. *FTC v. Borden Co.*, 383 U.S. 637 (1960). Petitioner's arbitrary exclusion of the substantial sales of these pies of like grade and quality, each highly competitive with all pies in the market, is simply a subterfuge designed (a) to ignore the fact that nearly half of Utah Pie's "lost" market share in 1959 shifted to the All Other sellers; and (b) to eliminate more than half of Utah Pie's sales in 1960 and 1961 which were attributable to its Frost 'N Flame and other private and controlled label brands. Only by thus manipulating the statistics can petitioner hypothesize a transfer of market share from itself to Carnation. Percentages of an arbitrarily fragmentized market are meaningless. Compare *Wolfe v. National Lead Co.*, 225 F.2d 427 (9th Cir. 1955), *cert. denied* 350 U.S. 915 (1955).

Not once in 1959, the only year Utah Pie suffered a decline in its market share, did Carnation's prices approach those of the lower-priced Utah brand; and in 1959 Carnation's market share dropped to 8.6 per cent, the lowest point in the period 1958-1961 (Ex. A-35; R. 1065, 5827, 5830; Ex. A-38, R. 1100, 5845).

The truth is that Carnation was injured by Utah Pie, not vice-versa. It was Utah Pie which initiated the price war in the Salt Lake market, of which Carnation, with a high-

priced pie and a declining market share, was the principal victim (Ex. A-38, R. 1100, 5845). It was Utah Pie's Frost 'N Flame pie, priced below the entire market including the Utah brand, which outsold Simple Simon ten-to-one at Associated Grocers and boosted Utah Pie's market share to 45 per cent in 1960 and 1961 (*Ibid*; Ex. C-R; R. 1165, 5821). And it was Utah Pie's price-cutting which triggered the responses by other sellers, with none of which Carnation's high prices were competitive (see pp. 20-22, *supra*).

In summary, Utah Pie's evidence in this case could not support a finding that it suffered any injury as the proximate result of any illegal activity of Carnation. On the contrary, such evidence clearly establishes:

(a) Utah Pie's price cuts had no relation to Carnation's Salt Lake prices nor to any supposed price differences between those prices and Carnation's prices in any other market.

(b) Utah Pie's changes in market share went to others in the market, not to Carnation, and, in fact, Carnation's share actually declined, due to competition's lower prices and the introduction of lesser weight and private label pies.

(c) Utah Pie suffered no depreciation in the value of its business, but in fact prospered and grew fourfold between 1957 and 1961 to the end that it practically monopolized the Salt Lake market for frozen fruit pies.

(d) The over-all result in the Salt Lake market, dominated by Utah Pie and replete with strong competitive activity, was that Carnation lost volume, market share and profits.

III. PETITIONER'S PER SE THEORIES ARE INAPPLICABLE TO CARNATION.

Failing to convince the Court of Appeals that its evidence met the requirements of section 2(a) under the normal criteria, petitioner presents this Court with two novel theories, highly appealing in their simplicity as they require little or no proof by petitioner.

Although losing to the jury on the claim that Carnation conspired with one or both of the other respondents to destroy Utah Pie's business in violation of sections 1 and 2 of the Sherman Act and section 2(a) of the Robinson-Patman Act, petitioner's first *per se* theory (Br. 66, et. seq.) is to "merge" the three respondents by its own *ipse dixit* and find that such a merger would violate section 7 of the Clayton Act (15 U.S.C. § 18). Needless to state, the record in this case and the unappealed jury verdict for each respondent belie any such theory of combination, licit or illicit.

Petitioner's second novel theory is that a large "conglomerate" manufacturer which sells its product in more than one market at different prices *per se* violates section 2(a) of the Robinson-Patman Act, subject only to being able to prove the defense of good faith meeting competition. Under this theory, a plaintiff need only prove that the defendant is a large "conglomerate" manufacturing concern, selling its product at different prices in different markets—and rest. Indeed, such proof would normally be stipulated as the facts of modern economics are that most consumer goods are sold at different prices in different markets—depending on the competitive situation in each market;[1] and most manufacturers who sell

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[1] *Anheuser-Busch, Inc. v. F.T.C.*, 289 F2d 835 (7th Cir. 1961); *Balian Ice Cream Co. v. Arden Farms Co.*, 231 F.2d 356 (9th Cir. 1955), *cert. den.* 350 U.S. 991 (1956); see *General Foods Corp.*, 50 F.T.C. 885 (1954) and *Purex Corp., Ltd.*, 51 F.T.C. 100 (1954).

in more than one market sell more than one product. Even petitioner, classed in its own brief as Lilliputian, sold a variety of products, including fresh pies, frozen pies, under its own and private labels, and other products, at different prices in different markets (R. 776, 788; Ex. A-46; R. 997, 5847, 5850).

The antitrust laws require more than such simplicity of proof to eliminate the express words of the Congressional enactment that a price difference is not unlawful unless "the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly." As this Court observed in *Federal Trade Commission v. Sun Oil Co.*, 371 U.S. 505, 527 (1963):

> In appraising the effects of any price cut or the corresponding response to it, both the Federal Trade Commission and the courts must make realistic appraisals of relevant competitive facts. Invocation of mechanical word formulas cannot be made to substitute for adequate probative analysis.

But petitioner argues at pages 69-73 and 93-94 of its brief that "the mere existence of a large conglomerate seller is a threat to competition" and that "the respondents[1] should have sold in every market at the same price absent their ability to prove either a cost justification, or a good faith meeting of competition defense, or a changing conditions of market defense." These assertions are a patent attempt to eliminate from the statute the requirement that to find a price difference unlawful the plaintiff must establish that the effect of a price discrimination "may be substantially to lessen competition or tend to create a monopoly."

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[1]We refer elsewhere to this use of the plural as a misleading attempt to create a combination among the respondents when the jury had found none to exist.

The law is clear that selling at different prices in different markets is not in and of itself unlawful. The Seventh Circuit in *Anheuser-Busch v. F.T.C.* said:

> The use of different prices in different markets in the beer industry is, in itself, a proper method of competition. 289 F.2d at 840.

The Court of Appeals for the Tenth Circuit in the case at bar held:

> As we have heretofore stated, selling at lower prices in the Salt Lake City market than in other market areas in and of itself is not a violation of § 2(a). R. 1498.

The Federal Trade Commission, charged with the primary responsibility for enforcement of section 2(a) of the Robinson-Patman Act, has rejected any *per se* approach to territorial price differences. Commissioner Elman in a concurring opinion in *Forster Manufacturing Co., Inc.*, FTC Docket No. 7207, 3 CCH Trade Reg. Rep. ¶17,304, stated:

> The Commission has many times pointed out that it does not regard all area price differences as dangerous to competition. Thus, in Anheuser-Busch, Inc., 54 F.T.C. 277, 303, the Commission stated: "if the order was worded so as to require respondent to maintain uniform prices this, if anything, would be contrary to market realities. Respondent's prices vary in the different markets in which it sells, resulting in differences which, with the exception of the price discrimination charged in the complaint, are not in issue in this proceeding." See also Maryland Baking Co. v. F.T.C. [1957 TRADE CASES ¶ 68,681], 243 F.2d 716, 719 (4th Cir. 1957); Commission Policy Toward Geographic Pricing Practices, Trade Reg. Rep. ¶ 10412 (9th ed. 1948); Reply Brief for the F.T.C., p. 8, F.T.C. v. Anheuser-Busch, Inc. (No. 389, October Term 1959) [1960 TRADE CASES ¶ 69,737], 363 U.S. 536, quoted in Quaker Oats Co., F.T.C. Docket 8112 (decided Nov.

> 18, 1964), pp. 4-5; "The Commission has recognized that there is a crucial difference 'between normal and legitimate pricing activities designed to obtain a larger share of business in a marketing area and those which represent a punitive or destructive attack on local competitors and impair the vitality and health of the process of competition.'"

This Court in *Federal Trade Commission v. Anheuser-Busch, Inc.*, 363 U.S. 536 (1960) found that a price difference was only one element of section 2(a) and remanded the case to the Court of Appeals to examine the record to determine if the Federal Trade Commission had met its burden of proof of competitive injury caused by such difference. The petitioner would have this Court prescribe a *per se* rule for pies when it refused to do so for beer.[1] As this Court stated in that case:

> In other words, the statute itself spells out the conditions which make a price difference illegal or legal, and we would derange this integrated statutory scheme were we to read other conditions into the law by means of the non-directive phrase, "discriminate in price." Not only would such action be contrary to what we conceive to be the meaning of the statute, but perhaps because of this, it would be thoroughly undesirable. As one commentator has succinctly put it, "Inevitably every legal controversy over any price difference would shift from the detailed governing provisions—'injury,' cost justification, 'meeting competition,' etc.—over into the 'discrimination' concept for *ad hoc* resolution divorced from specifically pertinent statutory text." Rowe, Price Differentials and Product Differentiation: The Issues Under the Robinson-Patman Act, 66 Yale L.J. 1, 38. 363 U.S. at 550.

The Court of appeals for the Seventh Circuit, on remand of *Anheuser-Busch* from this Court, disposed of the "big company" aspect of petitioner's *per se* theory. It said:

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[1]Beer is an industry where this Court has noted a trend toward concentration. Cf. *United States v. Pabst Brewing Co.*, 384 U.S. 552 (1965).

> Nor are we convinced that guilt of an alleged malefactor can be proved only by bigness. *Anheuser-Busch v. F.T.C.*, 289 F.2d at 843 (7th Cir. 1961).

The court added as a footnote to this statement:

> If bigness be a disqualification for a firm to compete, interesting collateral questions arise, such as how small does a company have to be before it has a right to enter into price competition with its competitors? And how large does it have to be before it must stop competing in price?

Petitioner argues that because Carnation is a large national seller of many products it has the potentiality to engage in predatory pricing conduct. This same contention was made in *Anheuser-Busch* and rejected by the Court of Appeals on the basis that "a finding of a violation cannot rest upon conjecture as to what it might do. Potentiality to commit an act cannot be used as a substitute for proof of the act itself." 289 F.2d at 843.

In the case at bar Carnation's "potentiality" is offset by the equal potentiality of Morton, Pet, Libby and other national sellers as well as the entrenched position of Utah Pie itself. And, as with *Anheuser-Busch*, the record affirmatively shows Carnation used restraint in its competitive efforts. "Its conduct was in conformity with the principle that competition is the decisive force in the market place." 289 F.2d at 842. See appendices VII and VIII to the opinion of the Court of Appeals in the case at bar (R. 1518, 1524). That court after stating:

> Carnation's reduction of prices in the Salt Lake City market was made in an effort that was far from successful to compete with the prices at which Utah Pie offered and sold its pies. Clearly, Carnation was never able to compete with Utah Pie's Frost 'N' Flame pie price, and only part of the time with the price at

> which Utah Pie priced and sold its Utah brand pies . . . (R. 1492)

concluded from a review of the actual market facts that the evidence refutes a finding that there was a reasonable possibility that Carnation "by price differences or other acts" would injure or prevent competition in the Salt Lake market or that "Carnation had taken or would take in the future any appreciable amount of frozen pie business from Utah Pie." (R. 1507-1508)

As an attempt to supply a rationale for ignoring the *Anheuser-Busch* decisions, petitioner suggests two other indicia of economic activity which it claims support a finding of injury to competition—an asserted "high and apparently growing concentration" in the industry and an alleged market power of Carnation *and* the other respondents to fix prices and eliminate competition.

A. There is No Tendency Toward Concentration In The Industry.

Petitioner claims a trend toward concentration in the frozen pie industry and, particularly, in the Salt Lake market. Not only did petitioner fail to produce any evidence to support this bald assertion, but the only evidence of record touching on the subject belies it. The record shows Carnation was first in the Salt Lake market in 1955, followed shortly thereafter by Pet (R. 451, 1202, 1203). The analysis of advertising (Ex. A-27; R. 893, 5824) shows that in the first nine months of 1957, before Utah Pie entered the frozen pie business, six brands were advertised in the Salt Lake market, ranging from nine advertisements for Ocoma to two for Bradleys. Carnation's brand, Simple Simon, had five out of thirty-two ads in this nine-month period or a little over 15 per cent. After Utah Pie captured 67 per cent of the market in the next

year, both Ocoma and Bradley disappeared from the Salt Lake market as advertisers.

In 1961, at the end of the four-year period covered by petitioner's complaint, there were twelve brands advertised — three of which were Utah Pie Company labels, Utah, Frost 'N Flame and Mayfresh. These three accounted for seventy-six out of the 142 identified brand advertising or over 50 per cent. Carnation was able to muster only ten advertisements in this period or a little over 7 per cent — a 50 per cent drop from its advertising volume in 1957. Of the 1957 advertisers, Pict-Sweet and Morton were still in the market, but Pet advertised only its Swiss-Miss brand. In addition, there were four new brands advertised, including Libby's — a label of one of those large conglomerate sellers whose mere presence in the market is a threat to competition, according to petitioner.

In the three years 1959 to 1961 when Utah Pie claims it was injured, there were seventeen brands advertised. Of these, petitioner's three brands accounted for 161 out of 363 identifiable advertisements or 44 per cent. Carnation had 26, or 7 per cent of the brand advertising during this period.

If the advertising frequency indicates any trend toward concentration in the Salt Lake market, as petitioner apparently contends (Br. 78), the clear indication is that Utah Pie Company through its price cutting and discriminatory prices to large buyers which the jury found to violate the Robinson-Patman Act, had concentrated the major segment of the market in its own pocket.

The conclusion from the advertising volume that any concentration in the Salt Lake market is in the hands of Utah Pie, not Carnation, is confirmed by an analysis of market shares, as the following table from Exhibit A-35 (R. 1065, 5827) indicates:

	1958	1959	1960	1961
Utah Pie	67.3	34.3	45.7	45.8
Carnation	9.7	8.6	12.0	8.1
Other Sellers[1]	23.0	57.1	42.3	46.1

The same highly competitive situation existed in each of the other western markets in which Carnation attempted to sell. In Los Angeles, Carnation's most important market (R. 1189), its competitors were "Pet, Morton, County Fair, Johnston, Mary Elizabeth, ten or fifteen others." (R. 1190) In San Francisco, Carnation's second most important market, its competitors were "County Fair, Johnston, Morton, Pet Ritz, Frigid Dough, Banquet, plus many others too." (R. 1190) Its third most important market was Portland, where "we ran into some regional competitors . . . along with our old ones, Pet, Morton, Swiss Miss; we have Chet, Bradleys, plus four or five other companies." In its fourth most important market, Spokane, its competitors were "Pet, Pet-Ritz, Swiss Miss, Morton, ran into Banquet, Frigid Dough, some Bradley, some Chet and some four or five others. A lot of companies in this business." (R. 1191)

Carnation's western sales manager classified the Seattle market and the Salt Lake market as about tied for next in importance "because we don't have much in either of them." (R. 1192) He identified Carnation's competitors in Seattle as being "Pet, Swiss Miss, Morton, Banquet, plus four or five other labels. Actually we are very — we are just about extinct in the Seattle district." He stated the Salt Lake market was similar to many of the other markets in the west in that it

[1]Other sellers in the Salt Lake City market include most of the name brands covered in the 1959 MRCA survey of the national market (Ex. 61; R. 436, 2294). That survey also showed that Carnation's national market share was 8.7 per cent—almost the same share it held in the Salt Lake market in the same year.

is an extremely price conscious market. He identified Carnation's competitors in Salt Lake as "Pet-Ritz, Swiss, Morton, Utah Pie and four or five other brands." It is notable that in each of these markets there are a number of larger competitors present plus four or five smaller ones, and that the same large national or regional distributors are present in each of the markets identified, including Salt Lake City. But only in the Salt Lake market is there one competitor which has a dominant share of the market — Utah Pie Company — whose share ranged from two-thirds to 45 per cent of all the pies sold.

Nor does the evidence as to the frozen pie market outside Salt Lake City support petitioner's contention as to a trend toward concentration. Carnation was an early entry in the market, but by the time of trial there were over 200 companies in the business (R. 1011) and at least 10 different name brands competed in the principal western markets (R. 1191), plus other local and regional competitors in each market. In only Salt Lake City was there any evidence of any one seller having a dominant market position — and that seller was Utah Pie itself.

The only evidence as to the nature of the national market was a study made by Market Research Corporation of America in 1959 to guide Pet as to whether it should attempt to enter the "price" pie market (Ex. 61; R. 436, 2275-2319. The study concludes, at least for the period 1958-59, that there were two separate markets in the frozen pie business — quality and price — and clearly shows that Carnation competes effectively only in the quality segment of the market which was declining in relation to the price segment (R. 2295). Carnation is not even listed in the "price" segment which accounted for 46 per cent of the total national volume. The study also indicated

that the same ten to twelve brand names which compete nationally are the principal competitors of Carnation in the western markets hereinabove identified and that the so-called minor brands hold a substantial segment of both the quality and the price markets on a national basis.

The only evidence in the record indicates, not a trend toward concentration, but that in each market there are a large number of active competitors, national, regional and local — except in Salt Lake City where Utah Pie is dominant.

B. Carnation Had No Dominant Market Power Anywhere.

Petitioner baldly asserts, without any evidence to support it, that "It could fairly be said that *respondents* have the power to control prices or exclude competition." (Br. 77)

This use of the plural by petitioner suggests that this Court disregard the jury's finding at the trial that none of the respondents conspired — a jury finding which Utah Pie did not appeal. It is submitted that for petitioner to treat the facts in its statements to this Court as if the jury had found for it on the conspiracy charge is such a blatant misrepresentation as to be grounds for dismissing the writ as improvidently granted. This case is not a Sherman Act case and no amount of double talk or indiscriminate use of plurals can restore petitioner's lost verdict on that issue.

Aside from misrepresenting the facts by treating each of the respondents as if it had acted in concert with either or both of the other two respondents and treating the economic facts as if all three respondents[1] had merged, petitioner asserts that the Court of Appeals erred in following the jury

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[1]The record shows the other two respondents, Pet and Continental are major competitors of Carnation in every western market (R. 1189-92).

verdict that there was no combination or conspiracy against petitioner by claiming that that court did not examine the market facts "in a context of similar discriminations by the other respondents." (Br. 80)[1]

This recognition by petitioner that other sellers in the market were engaging in robust price competition directly contradicts Utah Pie's theory of predatory intent by Carnation toward Utah Pie Company, *Anheuser-Busch, Inc. v. FTC*, *supra* at 842, and it completely destroys Utah Pie's claim of injury from acts of Carnation. As noted by the court in *American Oil Co. v. F.T.C.*, 325 F.2d 101, 106 (7th Cir. 1963), *cert. den.* 377 U.S. 954:

> Thus, whatever injury to ability to compete, whether actual or probable, as is shown by the record, was not only minimal but there is no substantial evidence to show that it was the result of American's price reductions to its Smyrna dealers rather than for the most part attributable to the fact that the major brands of gasoline were being sold in the Smyrna area for substantially less than in the Marietta area.

The record indicates how heavily Carnation's business in the Salt Lake market was being bludgeoned by petitioner's own unlawful discriminatory practices and by the otherwise aggressive character of competition in the Salt Lake market.

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[1] The Court of Appeals clearly stated the basis on which it reviewed the record, stating:

> The primary question presented by each of these appeals, except the one from the judgment against Continental on its counterclaim, is whether *the evidence*, when viewed in a light most favorable to Utah Pie and it is accorded the benefit of all the inferences the evidence fairly supports, was sufficient to support a finding *as to each defendant* that it by price differences or other acts had substantially lessened competition, tended to create a monopoly, or injured, destroyed, or prevented competition with it, or there was a reasonable possibility that by such acts it would do so in the future. (R. 1498) [Emphasis added.]

Petitioner's theory of Carnation's mere presence in the market as being sufficient to conclude that its conduct was in combination with others would have the anomalous effect of imposing liability on the only seller whose market share was less in 1961 than its average market share over the four-year period.

Petitioner would have this Court assume each of the respondents engaged in parallel pricing conduct and then use that assumption to support a finding of competitive impairment created by a single seller's action. In short, petitioner would use this approach as a short-cut device to reach the conspiracy result the jury refused to find.

As noted by ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT (1962), p. 170:

> In sum, when price discrimination is embedded in a proven pattern of conspiratorial conduct, it may be properly outlawed as part and parcel of the broader illicit scheme. [E.g., *FTC v. Cement Institute*, 333 U.S. 683 (1940)] But in the absence of conspiracy among the sellers, impaired competition on the seller level in this context cannot be viewed as the statutory "effect of" an *individual* seller's price quotation.

But in addition to the absence of concerted conduct, there was not even parallel action among the respondents. Carnation had one label — the Simple Simon 24-ounce pie. It was always priced above the general market level and, as a result, suffered a declining market share, particularly with the large buyers, who concentrated on buying the cheaper "price" pies such as the Frost 'N Flame label offered by Utah Pie at discriminatory prices. Pet found its premium brand Pet-Ritz losing out and switched its selling energies to the Swiss Miss 20-ounce pie in the "price" market. Morton was only in the market spasmodically, the last time in July and August, 1961, also with a lighter weight pie.

To talk of market power in the abstract or in terms of a theoretical merger among the respondents is not this case. Mere reference to the record as to Carnation's market power in Salt Lake and other markets in which Carnation attempted to sell its frozen fruit pies is sufficient to demonstrate that petitioner's argument is not only theoretical, it is without foundation in fact.

The evidence is without dispute that Carnation could not sell its pies in any market at prices higher than its competitors in that market (R. 1190-1193) and that strong national, regional and local sellers are active in each market in which Carnation competes. Petitioner's thesis ignores this existence of countervailing power in each and every market in which Carnation offers its pies for sale.

In the Salt Lake market, Carnation was met with the illegal price cutting and price discriminations of Utah Pie, the competition of private labels, such as petitioner's Frost 'N Flame and Mayfresh, the smaller and cheaper Swiss Miss 20-ounce and the Morton 22-ounce pies and the "price" pies of Frigid Dough, Blue Star and Libby. Small wonder then that in both 1959 and 1960 Carnation sold fewer pies than the "all others" category (not parties to this lawsuit) and in 1961, on the six flavors involved in the lawsuit, Carnation sold 18,135.5 dozen as compared to 18,118 dozen for "all other" sellers and was outsold by every other seller in the market (Ex. 62; R. 437, 2323-2326). This strong competition which resulted in Carnation having a smaller market share in 1961 than it had in 1958, when Utah Pie captured two thirds of the Salt Lake market, included both Utah Pie, with its advantages of location, lower costs, ability to sell in smaller quantities and well known local name, and the large national sellers such as Pet, Morton, Libby, Johnston, Frigid Dough and Blue Star.

Clearly in the market where Utah Pie sold its pies Carnation had no market power to control prices or to eliminate competition. And in the other markets where Carnation sold its eight-inch pies and Utah Pie did not, the only evidence is that the same strong competition existed—to the extent that Carnation was forced to sell its eight-inch pies in every market, after full allocation of overhead, at a loss. This evidence clearly does not present a picture of dominant power in any market area.

IV. PETITIONER'S OTHER ATTACKS ON THE OPINION OF THE COURT OF APPEALS ARE ALSO WITHOUT MERIT.

Aside from complaining that the Court of Appeals did not adopt its *per se* theories of liability, petitioner asserts a number of purported errors in analysis of the record and the application of the appropriate legal principles. None of these has merit as to Carnation.

A. The Court of Appeals' Opinion Does Not Conflict With the Fourth Circuit's Maryland Baking Decision.

Petitioner's assertion of a conflict between the opinion of the Tenth Circuit Court of Appeals in the case at bar, and the decision of the Court of Appeals for the Fourth Circuit in *Maryland Baking Co. v. Federal Trade Commission*, 243 F.2d 716 (4th Cir. 1957), is without foundation in the record. In that case the Fourth Circuit found:

1. *That the defendant cut its prices 25 per cent on a particular type of ice cream cone manufactured by its local competitor.* No such price cuts were made by Carnation in the Salt Lake market or anywhere else. See Appendices VII and VIII, R. 1524-1525.

2. *That the price cuts were made by the defendant in a limited area where its small competitor operated.* The record shows that Carnation's prices varied from market area to market area as competitive conditions in "different, separate, distinct, heterogeneous and unrelated markets" varied (R. 1485, 1494). See exhibits C-G to C-N; R. 1001, 5767-5774 for a graphic demonstration of varying prices in variable markets. In each exhibit the black line is Carnation's Salt Lake price, the red line being Carnation's price in the other named markets.

3. *That the defendant maintained higher prices in other markets where it operated and its local competitor did not.* The same statement made under the preceding paragraph applies here. In addition, the Court of Appeals found expressly that Carnation did not make up losses on sales of frozen pies in the Salt Lake City market area through profits of sales of frozen pies in other market areas (R. 1492).

4. *That the defendant in the Maryland Baking case cut its prices for the purpose of driving its local competitor out of business.* There is no such evidence in the case at bar as to Carnation.

5. *That the effect of the defendant's price cutting activities in the Maryland Baking case was to deprive its competitor of about one-half of its volume.* In the case at bar Utah Pie's volume increased every year, while Carnation's market share was less in 1961 at the end of the period than it had been in 1958 when Utah Pie captured 66 per cent of the market (Pl. Ex. 62; R. 437, 2323).

Petitioner points to the decline in market share suffered by the local manufacturer in *Maryland Baking* and claims that Utah Pie's market share declined from 65 per cent in 1958 to

45 per cent in 1960 and 1961. The fallacy in petitioner's analogy is that in *Maryland Baking* the loss of market by the local manufacturer went to the defendant who initiated the price cuts for the purpose of driving the local competitor out of business. In the case at bar any decline in market share suffered by Utah Pie from its 1958 near monopolization of the market went to other sellers, not to Carnation (R. 2323).

B. There Was No Evidence of Predatory Intent or Conduct by Carnation.

It is submitted that the decision of the Court of Appeals in the case at bar is in line with the *Anheuser-Busch* decision of this Court, *FTC v. Anheuser-Busch*, 363 U.S. 536 (1960) and of the Court of Appeals, *Anheuser-Busch, Inc. v. FTC*, 289 F.2d 835 (7th Cir. 1961), with *Balian Ice Cream Co. v. Arden Farms Co.*, 231 F.2d 356 (9th Cir. 1955) and *American Oil Co. v. FTC*, 325 F.2d 701 (7th Cir. 1963). This case is clearly distinguishable on the facts from the predatory cases such as *Maryland Baking, supra*, *Moore v. Mead's Fine Bread Co.*, 348 U.S. 115 (1954); *E. B. Muller Co. v. FTC*, 142 F.2d 511 (6th Cir. 1944), *Porto Rican American Tobacco Co v. American Tobacco Co.*, 30 F.2d 234 (2nd Cir. 1929); and *Atlas Building Products Co. v. Diamond Block & Gravel Co.*, 269 F.2d 950 (10th Cir. 1959).

In Anheuser-Busch, the Court of Appeals stated:

> The use of different prices in different markets in the beer industry is in itself a proper method of competition. (289 F.2d 835 at 840.)

In the case at bar the Court of Appeals for the Tenth Circuit stated:

> We do not think Congress intended that nationwide sellers in different, separate, distinct, hetero-

> geneous and unrelated markets, with different competitive conditions, must sell at the same price levels in each of such markets. (R. 1498)
>
> The fact that a seller doing an interstate business lowers his price in one market area, without making a corresponding reduction in all other market areas in which he sells, is not in and of itself a violation of §2(a). That is especially true where the marked areas involved are distinct, disconnected, unrelated, and heterogenous, as are the areas involved in the instant case. (R. 1494)

In *Moore v. Mead's Fine Bread Co.*, 348 U.S. 115 (1954), the defendant engaged in an interstate baking business and competed in Santa Rosa, New Mexico, with a local baker. When the Santa Rosa merchants agreed to purchase the local baker's products exclusively, the interstate baker cut its price only in Santa Rosa while maintaining higher prices in other markets. The result was that the local baker went out of business. In *Maryland Baking Co. v. FTC*, 243 F.2d 716 (4th Cir. 1957), the respondent cut the price of its ice cream cones by 25 per cent only in the limited area where a small competitor had its business. In *E. B. Muller Co. v. FTC*, 142 F.2d 511 (6th Cir. 1944), the respondent sold chicory to customers in New Orleans where it had but one competitor, at or even below its costs, and maintained higher prices everywhere else. The Commission found a deliberate intent to eliminate the one competitor. In *Porto Rican American Tobacco Co. v. American Tobacco Co.*, 30 F.2d 234 (2nd Cir. 1929), a large tobacco company reduced the price of its cigarettes in one market to the level of a cheapter brand of a local manufacturer to punish him and, if possible, eliminate him. In *Atlas Building Products Co. v. Diamond Block & Gravel Co.*, 269 F.2d 950 (10th Cir. 1959), Atlas sold building blocks in the El Paso, Texas, market and in the area adjoining Las Cruces,

New Mexico, where it competed with Diamond, a local firm. Atlas lowered its prices only in the Las Cruces area to a level below the price at which Diamond could profitably operate, thereby utilizing its "dominant market power for predatory ends." (*Id.* at 956)

No such aggressive overtones are inherent in the case at bar. Carnation's prices in each market depended on local competitive conditions in each different market. The result was a constant fluctuation in prices among the various markets as compared to the Salt Lake market. (Exs. C-G, C-H, C-I, C-J, C-K, C-L, C-M, C-N; R. 1001, 5767-5774.) These exhibits show the same variable relationship to Salt Lake City whether the prices be those in Los Angeles, where Carnation has its plant, in Spokane, where Utah Pie sold its Sonny Boy pies successfully or in Phoenix, a point roughly equi-distant from Los Angeles and Salt Lake City, where Utah Pie did not attempt to sell. Since these prices were determined by competitive conditions in each market, and Carnation had dominant market power in none, there was no nexus between the different prices in the different localities. The Court of Appeals concluded:

> Since deals were directed at local competitive conditions, they differed in duration, type and amount in each market area, so that Carnation's net prices in each of the national market areas also frequently differed. At times during the period 1958 to 1961, Carnation's prices in the Utah area were higher than those charged in the Los Angeles area and at times they were lower. There was no relationship between the prices in the two areas. The price in each was determined by local competitive conditions (R. 1485)

Lacking such nexus, petitioner has no basis for contending that any of these prices caused any asserted injury either to it or to competitors in the Salt Lake market. *Balian Ice Cream Co. v. Arden Farms Co.*, 231 F.2d 356 (9th Cir. 1955);

Anheuser-Busch, Inc. v. FTC, 289 F.2d 835 (7th Cir. 1961); Rowe, *op. cit.*, pp. 166-169; *Purex Corp., Ltd.*, 51 FTC 100 (1954); *Shore Gas & Oil Co. v. Humble Oil Refining Co.*, 224 F. Supp. 922 (D.C.N.J. 1963).

In the words of the Seventh Circuit in the *Anheuser-Busch* case, Carnation's conduct "is the antithesis of the predatory misconduct condemned in the above territorial pricing cases relied on by the Commission." 289 F.2d at 842.

Being unable to bring its case within these well established principles of predatory conduct or such key indicia of probable competitive impairment as monopoly or overpowering position in wider markets,[1] aggressive objectives toward Utah Pie[2] or deep, sustained undercutting of Utah Pie's prices,[3] petitioner asserts two other bases for inferring predatory intent on the part of Carnation:

1. *Discriminatory low prices at places distant from its plant.*

Petitioner states at page 96 of its brief:

> Under conditions of perfect competition, sellers charge the market price in effect when and where their goods are sold.

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[1] *Atlas Building Products Co. v. Diamond Block & Gravel Co.*, 269 F.2d 950 (10th Cir. 1959); *Porto Rican American Tobacco Co. v. American Tobacco Co.*, 30 F.2d 234 (2nd Cir. 1929).

[2] *Atlas Building Products Co. v. Diamond Block & Gravel Co., supra; Porto Rican American Tobacco Co. v. American Tobacco Co., supra; Moore v. Mead's Fine Bread Co.*, 348 U.S. 115 (1954); *Maryland Baking Company v. FTC*, 243 F.2d 716 (4th Cir. 1957); *E. B. Muller Co. v. FTC*, 142 F.2d 511 (6th Cir. 1944); *Forster Manufacturing Co. v. FTC*, 355 F.2d 47 (1st Cir. 1964).

[3] *Moore v. Mead's Fine Bread Co., supra; Maryland Baking Company v. FTC, supra; E. B. Muller Co. v. FTC, supra;* and *Atlas Building Products Co. v. Diamond Block & Gravel Co, supra.*

This is exactly the picture of Carnation's pricing in each market. As to Carnation's pricing policy in all markets generally, the Court of Appeals stated:

> Since deals were directed at local competitive conditions, they differed in duration, type and amount in each market area, so that Carnation's net prices in each of the national market areas also frequently differed. At times during the period 1958 to 1961, Carnation's prices in the Utah area were higher than those charged in the Los Angeles area and at times they were lower. There was no relationship between the prices in the two areas. The price in each was determined by local competitive conditions. (R. 1485)

And as to San Francisco, specifically:

> Moreover, there were substantial differences in competitive conditions in the northern California and Salt Lake City markets, two wholly unrelated markets, throughout the period here involved. (R. 1490)

Carnation's plant is located in Los Angeles. The fact is that not only was there no relationship between Carnation's prices in Los Angeles and Salt Lake, but Carnation's prices were not higher in Los Angeles than in Salt Lake when petitioner cut its prices.

TABLE XV

Prices for One Dozen Apple Pies on Dates of Utah Brand Price Cuts

Source: Pl. Ex. 91; R. 551, 4420 and Ex. C-O, R. 1164, 5779.

Date of Utah Brand Price Change	Frost 'N Flame Price	Old Utah Brand Price	New Utah Brand Price	Carnaiton's Salt Lake Price	Carnation's Los Angeles Price
April 14, 1958	-----	4.30	4.00	5.06	4.82
August 10, 1959		3.90	3.60	4.18	4.18
June 23, 1961*	3.10	3.50	2.75	3.50	3.44
Dec. 1, 1961	3.10	3.50	2.90	3.88	3.49

*The record is clear that Utah Pie made this cut to beat Morton's special offer in the summer of 1961 (Pl. Ex. 4; R. 67, 1530; R. 794).

This evidence conclusively demonstrates the absence of any causal connection between Utah Pie's claim of reduced prices and any differences between Carnation prices in Los Angeles and Salt Lake. Even more important in the context of seeking evidence of predatory intent is the fact that neither in Los Angeles nor in any market did Carnation have "dominant market power" to fix higher prices (R. 1189-1192) from which it might be "fairly inferred" that geographic price differences were utilized "for predatory ends," *Atlas Building Products Co. v. Diamond Block and Gravel Co.*, 269 F.2d 950 (10th Cir. 1959). In fact, the evidence is undisputed that Carnation's prices in every market were at the mercy of robust competition from every source (R. 1185-1192; Ex. M-19; R. 614, original exhibit is in custody of Clerk of this Court).

Finally there was nothing "unnatural" about Carnation having different prices in different markets. It was the natural result of petitioner's definition of "perfect competition." (Br. 96). Carnation merely sold its pies at the market price in effect in the market where the pies were to be sold. See e.g. *Balian Ice Cream Co. v. Arden Farms Co.*, 231 F.2d 356 (9th Cir. 1955); *General Foods Corp.*, 50 F.T.C. 885 (1954); *Purex Corp., Ltd.*, 51 F.T.C. 100 (1954). The latter case was complimented as a "carefully reasoned" decision in the REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 165, note 118 (1955).

2. *Sales at a loss.*

This Court noted in *FTC v. Anheuser-Busch*, 363 U.S. at 552:

> It might be argued that the existence of predatory intent bears upon the likelihood of injury to competition, and that a price reduction below cost tends to establish such an intent.

As the cases make clear, such an argument is pertinent only when such price cuts below the cost of production are made solely in the market where the alleged target of the predatory conduct is active. *Porto Rican American Tobacco Co. v. American Tobacco Co.*, 30 F.2d 234 (2nd Cir. 1929); *Moore v. Mead's Fine Bread Co.*, 348 U.S. 115 (1954); *E. B. Muller Co. v. FTC*, 142 F.2d 511 (6th Cir. 1944).

Petitioner's argument as to Carnation fails on this ground as well as on the existence of "losses" claimed to be "planned in advance." The Court of Appeals summarized the record as to Carnation on this issue as follows:

> Carnation did not make up losses on sales of frozen pies in the Salt Lake City market area through profits on sales of frozen pies in other market areas.
>
> Carnation's receipts from sales of frozen pies in the Salt Lake City market exceeded its direct costs, that is, manufacturing, spoilage and transportation costs. It probably also exceeded direct costs, if selling costs were included therein, but on the record before us we can only ascertain with certainty whether its receipts from sales exceeded direct costs, with selling costs included, as to apple pie sales. Carnation's offering prices for apple pie exceeded its direct costs, that is, manufacturing, spoilage, transportation and selling costs in each of the 44 months [fol. 1399] herein involved, except in February and March, 1960. In those months, its lowest offering price was $3.30 per dozen and its direct costs were $3.39 per dozen. Moreover, its average direct costs for the 44-month period were manufacturing— $2.934, spoilage— $0.02, transportation— $0.35, and selling— $0.282, or $3.586 per dozen. Its average lowest offering price for apple pie in such period was $3.915 per dozen. Hence, its average lowest offering price exceeded such average direct costs by $0.329 per dozen.
>
> Carnation made forecasts of losses in different markets from year to year, including the Salt Lake

City market area, based on the experience of the previous year and future expectations, but there was no pattern of such forecasts. They varied from year to year and market to market. (R. 1492-1493)

Petitioner would have this Court believe that Carnation sold its pies at a loss in Salt Lake alone and profited elsewhere. This is not correct. A fair analysis of exhibit 22 and the other evidence as to alleged losses (Ex. C-U; R. 1167, 5823; R. 1206-1207) shows four factors which are undisputed:

(a) The so-called "losses" came after allocation of part of general company overhead. Thus if Carnation had not made a contribution to overhead from the sale of its frozen pie products, that overhead would have to be borne by the operation of other divisions of the company. Inasmuch as frozen foods did sell above cost of production and did contribute to overhead, the fact that other divisions of the company made money is irrelevant to the case (Ex. C-U; R. 1167, 5823). Since we are looking for indicia of predatory intent, the question is not to be resolved in the "abstract," *United States v. National Dairy Products Corp.*, 372 U.S. 29, 34 (1963), but is "one of intent and purpose, not a choice of accounting methods." *National Dairy Products Corp. v. United States*, 350 F.2d 321, 330 (8th Cir. 1965), *rev'd on other grounds*, 384 U.S. 883, 16 L.ed.2d 995 (1966).

The record shows that Carnation's prices for its eight-inch, 24 ounce, Simple Simon pies were beset by competition in every market from light weight and private label "price" pies. Carnation was forced to reduce its prices everywhere to stay in any market. "One who reduces his prices in defense of his economic life cannot be guilty of eliminating competition or his competitor." *Ben Hur Coal Co. v. Wells*, 242 F.2d 481, 486 (10th Cir. 1957). The important fact in determining

intent is that, save for a short-lived temporary offer in February, 1960, Carnation's lowest price never undercut the lowest price of Utah Pie (see Table I, III, V and VII, *supra*). All Carnation did in the Salt Lake market was follow the declining price level, a decline initiated and prolonged by Utah Pie's price cuts and discriminatorily priced private labels. Carnation followed that declining pattern at a level well above that set by Utah Pie Company. In the critical years of 1959, 1960 and 1961 all brands, except Pet Ritz, were priced consistently below Carnation's Simple Simon label (Ex. A-38; R. 1100, 5845). This pattern hardly comports with predatory intent.

(b) The evidence shows that similar declining price patterns occurred in other markets where Utah Pie did not attempt to sell its pies (Ex. M-19; R. 614; original exhibit on file with the Clerk of this Court) and Carnation's "losses" [i.e. sales at prices below fully distributed overhead, but above direct cost] were incurred in every market where eight-inch fruit pies, rather than nine-inch pies and creams, were the major item sold. The following table demonstrates this graphically:

TABLE XVI

Carnation Frozen Foods Division — Summary of Territorial Profit and Loss

(Source: Pl. Ex. 22; R. 241, 2167, figures in upper right-hand corners of annual profit and loss statements.)

	1959		1960		1961	
Market	8" Pies % of total volume	Profit (loss) per case	8" Pies % of total volume	Profit (loss) per case	8" Pies % of total volume	Profit (loss) per case
S. Calif.	43%	.01	65%	(.04)	67%	(.01)
N. Calif.	17%	.07	32%	.22	26%	.16
Arizona	13%	(.06)	40%	(-0-)	22%	.10
Pac. NW & Mt. States	70%	(.07)	85%	(.20)	85%	(.13)
Southwest	61%	(.04)	77%	(.22)	74%	(.15)
S. Central	23%	.14	75%	(.34)	64%	(.20)
W. Central	4%	.10	44%	(.18)	72%	(.08)

(c) The "losses" were not confined to the Salt Lake market where Utah Pie concentrated its sales efforts, but were incurred on eight-inch pies everywhere. (*Ibid.*)

(d) The total dollar figures for the Pacific Northwest and Mountain States district cited by petitioner (Br. pp. 43, 99) did not represent losses attributable to the area where Utah Pie was active. Carnation's sales of eight-inch pies in the state of Utah represented only 5.5 per cent of its total Northwest and Mountain States district sales in 1959, 8.9 per cent in 1960 and 8.8 per cent in 1961 (Ex. C-O; R. 1163, 5775; Pl. Ex. 22; R. 241, 2167). Thus the dollar figures of profit and loss petitioner refers to are just as misleading and irrelevant as the figures on Carnation's total size and overall profits.[1]

Petitioner makes the additional misrepresentation (Br. p. 41) that Carnation "planned" losses, citing as authority plaintiff's Exhibit 5 (R. 446, 1656). C. V. Bye, Carnation's controller, stated the document was his *forecast* based upon information furnished him as to estimated sales and costs. Mr. Halgren, the chairman of the frozen food committee, referring to these forecasts prepared by the controller's office, testified:

> A. . . . Predicting loses is, of course, a reflection of what you expect to do next year, based on what you did the year before, based on the costs of producing the pie, based on the expenses of your company, and the portion that you are going to allocate to this particular division.

---

[1]A more realistic approach would be to note that of the $246,000 loss incurred by the Carnation frozen food division in all markets for the years 1959 to 1961, inclusive, Carnation's pie sales in the Utah market contributed approximately $15,000 or only a little over six per cent (Pl. Ex. 26; R. 378, 2180; Pl. Ex. 62; R. 437, 2323).

> And then you say, "Well, we guess we are going to sell this blank number of cases the coming year, and based on that, based on what we did before in the way of merchandising costs, we are either going to have a profit or a loss net.
>
> And it is a guide line. It shows us what direction we are going in our business. (R. 1205)

There was no pattern in the forecasts — they varied from market to market and from year to year. It takes more than a fertile imagination to convert a forecast such as represented by these documents, into a plan, as petitioner would have it.

Finally, petitioner asserts Carnation's losses in Salt Lake were "admittedly the result of a carefully calculated zone pricing system." (Br. p. 99). The undisputed evidence shows that Carnation's *actual* prices in each market were the result of deals set *ad hoc* for each separate market to meet the competitive situation in each market as it varied from time to time, and that any "losses" resulted from trying to compete in the eight-inch pie market in various localities with the vigorous competition in each locality both with prices and with cut-weight pies and private labels, not from the use of zone pricing.

C. The Court of Appeals Properly Reversed The Court Below As The Jury Verdict As To Carnation Was Contrary To And Not Supported By The Evidence.

The Court of Appeals clearly recognized the law governing its review of the record in this case:

> The primary question presented by each of these appeals . . . is whether the evidence, when viewed in a light most favorable to Utah Pie and it is accorded the benefit of all the inferences the evidence fairly supports, was sufficient to support a finding as to each defendant that it by price differences or other

> acts had substantially lessened competition . . . . (R. 1498)

The question whether the decision appealed from is supported by competent and substantial evidence is not one of resolving disputes of fact, but rather one of law. *Abrams v. United States*, 250 U.S. 616, 619 (1919); cf. *Mortenson v. United States*, 322 U.S. 369, 374 (1944). Such a question is clearly within the purview of appellate review and premised the decision of the Court of Appeals.

Petitioner contends that the Court of Appeals invaded the jury's province by ignoring facets of the evidence and by re-weighing and interpreting the evidence (Br. p. 106). The major "invasion" of jury prerogatives set forth by petitioner revolves around delimiting its ubiquitous "trading area." (Br. pp. 109-112). For example, the petitioner contends that the Court of Appeals in finding effective market areas to be coterminous with areas of newspaper circulation rejected evidence that "Utah Pie's marketing area, as a manufacturer, was the entire Intermountain and Pacific Northwest portion of the United States." (Br. p. 112). To the contrary, the opinion of the court demonstrates that these areas *were* considered and found from the analysis of the record to be negligible:

> In the first part of 1958, Utah Pie marketed its frozen pies in Utah and Idaho. It gradually extended its sales to other areas, so that by 1961 it was selling frozen pies in Utah, Idaho, Washington, Colorado and Wyoming. However, its sales outside of Utah and southern Idaho during the period involved in this law suit, 1958 to 1961, were negligible. (R. 1458)

Petitioner's theory of the relevant market is apparently that any community once visited by its one-man sales force, Gaylen Rigby, became thenceforth and forever part of a vaguely defined Utah Pie Company "trading area." Indeed a

visit to a single city supposedly brought in the whole state. Thus, Denver (hence Colorado) is assertedly within the "trading area" though the sum total of Gaylen Rigby's efforts there was "two or three trips" to Denver within "a six or eight-week period" in the fall of 1959 (R. 531). Likewise, the entire state of Wyoming is included though Utah Pie's four year Wyoming sales total scarcely a quarter truck load (Pl. Ex. 91; R. 551, 4420, 4576-4581) and though only once did Mr. Rigby's efforts take him east of Rock Springs (*Ibid.* R. 1531). Finally, Spokane (hence the whole state of Washington) is included by virtue of Utah Pie's discriminatory sales of its "Sonny Boy" private label to a single Spokane buyer in 1960 and 1961 (R. 769-770; Pl. Ex. 91; R. 551, 4420, 4568-4572), and Gaylen Rigby's two week auto trip "through the Northwest" in 1961 (R. 538).

Having correctly[1] defined the relevant market, the court then looked to the evidence to see whether a section 2(a) violation had been demonstrated. The court found that Carnation's prices varied geographically with varying market conditions in different markets, but it failed to find any evidence demonstrating that the effect of these varying and variable geographical price differences in different and unrelated markets was to substantially lessen competition.

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[1]Petitioner attacks (Br. 13) the definition of the Court of Appeals on the grounds that the Court counted only sales of apple pies in concluding that petitioner's sales outside the Salt Lake market area were negligible. Even if all flavors are considered, petitioner's only sales of any consequence outside of the Salt Lake Market were sales in 1960 and 1961 of the Sonny Boy private label to one buyer in Spokane, who purchased f.o.b. petitioner's plant in Salt Lake and five truckloads of pumpkin and mince sold to one buyer in Denver in the fall of 1959 at prices well below the prevailing Denver level (R. 743, Ex. 91; R. 4420, et. seq.). These two transactions accounted for approximately 9.3 per cent of petitioner's sales over the four year period. Almost 98 per cent of the balance of petitioner's sales were in the Salt Lake market.

The only possible action the court could take after concluding that the evidence was wholly insufficient to support a finding that Carnation had violated the act was to reverse the verdict of the court below. In so doing, its action was in accord with this Court's statement that where "the proofs were insufficient to submit to the jury the question . . ." the judgment below on the verdict shall be set aside.[1] *New York N. H. and H. R. R. v. Henagen*, 364 U.S. 441, 442 (1960).

In *Continental Ore Co. v. Union Carbide Corp.*, 370 U.S. 690, 783 (1962), the action was based on an alleged violation of sections 1 and 2 of the Sherman Act. The evidence adduced was adequate to support the jury finding that the defendants violated the Sherman Act by a plan to monopolize the vanadium market and that the plaintiff had suffered an injury and loss. In the case at bar the evidence was insufficient to justify a finding of violation of the statute so there is no reason to speculate about causation.

In *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 284 (1945), this Court stated:

> In the absence of more proof, the jury could conclude as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure plaintiff's business and *from the evidence of the decline in prices, profits and values*, not shown to be attributable to other causes that defendants' wrongful acts had caused damage to the plaintiff. [emphasis added]

Nowhere has petitioner demonstrated that Carnation's acts in this case resulted in a "decline in prices, profits and

[1] In view of the undisputed economic evidence wholly failing to establish the essential elements of a section 2(a) violation by Carnation, the "matters of inference" enumerated by petitioner in its brief on pages 109-10 could never properly go to the jury, particularly when the inferences petitioner seeks to draw are contradicted by documentary and statistical facts.

values." If anything, just the opposite was proven (R. 1459, 1506).

The review of the record contained in this brief demonstrates that the Court of Appeals did not invade the jury's prerogative to weight conflicting evidence — there being nothing of substance to weigh.

While it is true that ordinarily appellate courts accept the trial jury's findings on the issues of fact, these findings will be set aside when they are, as here, manifestly contrary to the evidence as a whole. *New York, N. H. and H.R.R. v. Henagan*, 364 U.S. 441 (1960); *Gunning v. Cooley*, 281 U.S. 90, 94 (1929).

D. The Court Of Appeals Placed Appropriate Reliance On Post-Complaint Evidence.

Petitioner concedes the admissibility of post-complaint evidence but "disagrees with the inference which the Court of Appeals drew from it." (Br. p. 120). The source of this so-called "inference" quoted by petitioner in its brief (pp. 119-120) results from an out-of-context excerpt. A reading of the "inference" in context demonstrates the nature of the reliance placed upon post-complaint evidence by the Court of Appeals.

> We, of course, recognize that it was not necessary for Utah Pie, in order to make a case against a defendant, to prove that its actions had already lessened competition, or tended to create a monopoly or injured, destroyed, or prevented competition with such defendant and that it was sufficient for it to prove that it was reasonably possible that such actions could do so in the future. But if such action did not substantially lessen competition, or tend to create a monopoly, or injure, destroy, or prevent competition with any of the defendants during the almost four years here involved; and regard be given also to Utah Pie's substantial volume increase in 1962 and the sharp volume decrease in 1962 of two of the defendants from their

1961 volume, it would seem to be quite unlikely that such a result would probably flow from such actions in the future. (R. 1500)

In *Federal Trade Commission v. Consolidated Foods Corp.*, 380 U.S. 592, 598 (1965), this Court stated that in a section 7 acquisition case, it is not error for an appellate court to consider post-acquisition evidence if such evidence is not given conclusive weight or allowed to override all probabilities. These guide lines were followed in the present case. Here in looking to any actual or potential lessening of competition, the Court of Appeals was guided by pre-1961 evidence. Its passing reference to post-1961 evidence was merely a natural follow-through confirming the fact that Carnation's acts were not potentially anticompetitive.[1] *Cf., United States v. DuPont De Nemours & Co.*, 353 U.S. 586, 597 (1956).

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[1]Petitioner would have this Court believe that the post-1961 acts of Carnation were due to the suit brought against it. However, the analysis of the record as to sales volume by the Court of Appeals demonstrates that Carnation's declining trend started in 1958 when Utah Pie captured 67 per cent of the market, not in August 1961, when it filed suit. Carnation's total sales volume in Salt Lake City in 1957 was 9,286 dozen. But in 1958, in a rapidly expanding market, its volume was only 5,863 dozen. Moreover, its sales volume did not keep pace with the rapidly expanding Salt Lake market in 1959, 1960 and 1961, and in 1962 its volume in Salt Lake City fell to an all-time low of 5,329.5 dozen (R. 1487).

* * *

Sales Volume

1958 Carnation— 5,863 doz.	Utah Pie— 37,969.5 doz.
1959 Carnation— 9,625 doz.	Utah Pie— 38,372 doz.
1960 Carnation—22,371.5 doz.	Utah Pie— 83,894 doz.
1961 Carnation—20,067 doz.	Utah Pie—102,690 doz.
1962 Carnation— 5,329.5 doz.	Utah Pie—129,658.5 doz.

(R. 1487)

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals as to respondent Carnation should be affirmed.

Respectfully submitted,

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APPENDIX A

§13-5-7. Utah Code Annotated 1953.

§13-5-7. Sales, less than cost. — (a) It is hereby declared that any advertising, offer to sell, or sale of any merchandise, either by retailers or wholesalers, at less than cost as defined in this act with the intent and purpose of inducing the purchase of other merchandise or of unfairly diverting trade from a competitor or otherwise injuring a competitor, impairs and prevents fair competition, injures public welfare, is unfair competition contrary to public policy and the policy of this act and is declared to be a violation of this act, where the result of such advertising, offer, or sale is to tend to deceive any purchaser or prospective purchaser, or to substantially lessen competition, or to unreasonably restrain trade, or to tend to create a monopoly in any line of commerce.

(b) 1. When used in this act, the term "cost" as applied to production shall include the cost of raw materials, labor, and all overhead expenses of the producer.

2. When used in this act, the term "cost to the wholesaler" shall mean the invoice cost of the merchandise to the wholesaler or the replacement cost of the merchandise to the wholesaler, whichever is lower; less all trade discounts except customary discounts for cash; to which shall be added:

(a) Freight charges not otherwise included in the invoice cost or the replacement cost of the merchandise as herein set forth, and (b) cartage to the retail outlet if done or paid for by the wholesaler, which cartage cost, in the absence of proof of a lesser cost, shall be deemed to be three-fourths of one per cent of the cost to the wholesaler as herein set forth after adding thereto freight charges but before adding thereto cartage.

3. When used in this act, the term "cost to the retailer" shall mean the invoice cost of the merchandise to the retailer within thirty days prior to the date of sale, or the date of offering for sale, or the replacement cost of the merchandise to the retailer, whichever is lower; less all trade discounts except customary discounts for cash; to which shall be added: (a) freight charges not otherwise included in the invoice cost or the replacement cost of the merchandise as herein set forth, and (b) cartage to the retail outlet if done or paid for by the retailer, which cartage cost, in the absence of proof of a lesser cost, shall be deemed to be three-fourths of one per cent of the cost to the retailer as herein defined after adding thereto freight charges but before adding thereto cartage and markup, and a markup to cover a proportionate part of the cost of doing business, which markup, in the absence of proof of a lesser cost, shall be six per cent of the cost to the retailer as herein set forth after adding thereto freight charges and cartage, but before adding thereto a markup.

4. When used in this act, the term "replacement cost" shall mean the cost per unit at which the merchandise sold or offered for sale could have been bought by the seller at any time within thirty days prior to the date of sale or the date upon which it is offered for sale by the seller if bought in the same quantity or quantities as the seller's last purchase of the said merchandise.